Supreme Court, U.S.
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No. 98-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. This petition raises the same question as that set forth in the pending petition for *certiorari* in *State Board of Equalization of the State of California v. Southern Pacific Transp. Co.*, No. 98-584, which is: Is section 306 of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"), 49 U.S.C. § 11501, appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment so as to abrogate the States' Eleventh Amendment immunity from suit in federal court? Petitioner requests that the Court consider the two petitions together.

LIST OF PARTIES

Petitioner is the State Board of Equalization of the State of California. Respondent is the Atchison, Topeka & Santa Fe Railway Company, a Delaware corporation with its principal place of business in Topeka, Kansas.

The following California Counties were defendants in the action below: Alameda, Contra Costa, Fresno, Kern, Kings, Los Angeles, Madera, Merced, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Joaquin, and Tulare.

Title 28 U.S.C. § 2403(a) may apply and this petition shall therefore be served on the Solicitor General of the United States.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	5
A. State-Assessed Property.	6
B. Proceedings Below.	7
REASONS FOR GRANTING THE WRIT	9
I. THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND THREATENS LIMITLESS CONGRESSIONAL ABROGATION OF ELEVENTH AMENDMENT IMMUNITY.	9
CONCLUSION	16

TABLE OF AUTHORITIES

Page

Cases

Allegheny Pittsburgh Coal v. Webster County
488 U.S. 336 (1988) 12, 13

Arkansas v. Farm Credit Services of Cent. Arkansas
520 U.S. 821, S.Ct. 1776 (1997) 17

Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n
481 U.S. 454 (1987) 10

City of Boerne v. Flores
521 U.S. ----, ----, 117 S.Ct. 2157,
138 L.Ed.2d 624 (1997) 11, 12, 13, 14, 15

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board
131 F.3d 353 (3rd Cir. 1997) 16

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board
148 F.3d 1343 (Fed. Cir. 1998) 17

CSX Transp., Inc. v. Board of Pub. Works
138 F.3d 537 (4th Cir. 1998), *cert.den.* ---- U.S. ----,
119 S. Ct. 63 (1998) 5

Department of Revenue, Oregon v. ACF Industries, et al.
510 U.S. 332 (1994) 17

Fox River Valley R.R. v. Dept. of Revenue
863 F.Supp. 893 (E.D. Wisc. 1994) 5

TABLE OF AUTHORITIES, CONT'D

Harper v. Virginia Department of Taxation
509 U.S. 86 (1993) 10

Katzenbach v. Morgan
384 U.S. 641 (1966) 12

Kimel v. State of Florida, Board of Regents
139 F.3d 1426 (11th Cir. 1998) 16

Nashville Chattanooga & St. Louis Ry. v. Browning
310 U.S. 362 (1940) 11

Oregon Short Line Railroad Company v. Department of Revenue, Oregon
139 F.3d 1259 (9th Cir. 1998) 1, 2 6, 8, 9, 10, 14

Pennhurst State School v. Halderman
451 U.S. 1 (1981) 14

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.
506 U.S. 139 (1993) 2

Quern v. Jordan
440 U.S. 332 (1979) 13

Seminole Tribe of Florida v. Florida
517 U.S. 44 (1996) 2, 4, 5, 7, 9, 10, 14, 16

Southern Railway Company v. Green
216 U.S. 400 (1909) 12, 13

Trailer Train Co. v. State Board of Equalization

TABLE OF AUTHORITIES, CONT'D

697 F.2d 860 (9th Cir. 1983) 10

Union Pacific R.R. v. Burton
949 F.Supp. 1546 (D. Wyo. 1996) 5

Union Pacific R.R. v. State of Utah
996 F.Supp. 1358 (D. Utah 1997) 5

Wheeling & Lake Erie Ry. v. Pub. Util. Comm'n
141 F.3d 88 (3rd Cir. 1998) 5

Constitutional Provisions

Cal. Const., Art. XIII, § 19 4, 6

Statutes

28 U. S. Code

§ 1341 4
§ 1254(1) 2

29 U.S. Code

§ 621 16

49 U.S. Code

§ 10101 11
§ 11501 2, 3, 5, 10

TABLE OF AUTHORITIES, CONT'D

California Revenue & Taxation Code

§§ 721, et seq. 4, 6
§ 722 6
§ 731 6
§ 732 6
§§ 741-744 6
§ 755 7
§ 756 7
§§ 2601, 2602 and 2603 7
§ 5148 7
§ 5170 7

Other Authorities

Patent & Plant Variety Protection Remedy Clarification Act, Pub.L. No. 102-560, 102 Stat. 4230 (1992) amending Patent Act (U.S. Supreme Court Docket No. 98-531)] 17

Trademark Remedy Clarification Act, Pub.L. No. 102-542, 102 Stat. 3567 (1992) amending Lanham Act (U.S. Supreme Court Docket No. 98-149)] 16

Section 306 of the Railroad Revitalization and Regulatory Reform Act 4

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OPINION OR JUDGMENT BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit, filed November 13, 1998, is not reported and is reprinted in Appendix A. The orders and judgments of the United States District Court for the Northern District of California are not reported and are reprinted in Appendix B. The decision of the Court of Appeals for the Ninth Circuit in *Oregon Short Line Railroad Company v. Department of Revenue, Oregon* is reported at 139 F.3d 1259 (9th Cir. 1998), and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit, apparently basing its action upon its recent decision in *Oregon Short Line Railroad Company, supra*, entered its judgment summarily affirming the decision of the United States District Court for the Northern District

of California. The district court had held that, although defendant California State Board of Equalization was immune from suit in federal court pursuant to the Eleventh Amendment with regard to other consolidated railroad cases, plaintiff Atchison, Topeka & Santa Fe Railway Company (hereinafter "Santa Fe") was entitled to summary judgment and permanent injunctions. The motion for summary affirmation was made solely on the basis of *Oregon Short Line*. In *Oregon Short Line*, the Ninth Circuit held, *inter alia*, that, although this Court's Eleventh Amendment holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), applied retroactively to all cases which were not fully final, under the *Seminole Tribe* test the 4-R Act enforced the Equal Protection Clause so as to abrogate the States' Eleventh Amendment immunity from suit in federal court. This Court has jurisdiction to review pursuant to 28 U.S.C. § 1254(1). A decision denying Eleventh Amendment immunity is final for purposes of appeal. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

CONSTITUTIONS, STATUTES OR REGULATIONS

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall a State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 11501 of Title 49 of the U.S. Code provides in relevant part:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem tax on rail transportation at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation

> subject to the jurisdiction of the Board under this part.
>
> (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. ...

Section 1341 of Title 28, United States Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Pertinent portions of the following sections of the California Constitution and the California Revenue and Taxation Code are reprinted in Appendix D:

> Cal. Const., art. XIII, § 19;
>
> Cal. Rev. & Tax. Code §§ 721, 722, 731, 732, 733, 741, 742, 743, 744, 755, 756, 2601, 2601, 2603, 5148, and 5170

STATEMENT OF THE CASE

Section 306 of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act", 49 U.S.C. § 11501) prohibits States and their subdivisions from applying tax schemes that unreasonably burden and discriminate against interstate commerce. Since its enactment, railroads have routinely filed suits in federal courts throughout the country to challenge State tax assessments as violative of the 4-R Act. However, this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), called into question whether the 4-R Act's stated abrogation of the States' Eleventh Amendment immunity was constitutional.

The Court of Appeals for the Ninth Circuit resolved the question in this case by granting respondent Santa Fe's motion for summary affirmance. Santa Fe's motion was based on the Ninth Circuit's recent decision in *Oregon Short Line, supra,* which held that Congress enacted the 4-R Act pursuant to the enforcement provisions of the Fourteenth Amendment. The Ninth Circuit therefore affirmed the district court's judgments in this case granting Santa Fe's motions for summary judgments and permanent injunctions.

The Ninth Circuit's ruling is inconsistent with this Court's precedent controlling the determination of whether Congress passed an enactment to enforce the Equal Protection Clause of the Fourteenth Amendment. The California State Board of Equalization (the "Board") again seeks this Court's review because of the importance of this issue to States' sovereignty, and because of the frequency with which 4-R Act cases are filed in federal court.[1/]

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1. On this issue, the Court has pending before it another petition from the Board, and the State of Ohio filed a supporting *amicus* brief that 29 other States joined. *State Bd. of Equal., Calif. v. So. Pacific Transp. Co., et al.*, No. 98-584, filed October 5, 1998. In its *amicus*

A. State-Assessed Property.

The Board is responsible for the annual valuation and assessment of the property of railroads and public utilities. Cal. Const., art. XIII, § 19; Cal. Revenue & Taxation Code §§ 721, 722, 731, and 732. Pursuant to California Revenue and Taxation Code section 732, the Board is required to mail notice to the railroads of the assessed value of their nonunitary property and advise them of the date by which a declaration of their intent to file a petition for reassessment can be filed. If a declaration of intent or a petition for reassessment is not timely filed, then the Board's assessment becomes final at the expiration of the period specified in the Board's notice. Cal. Rev. & Tax. Code § 733. If a petition for reassessment is filed, the Board's assessment becomes final on the earlier of its decision upon the petition or December 31 of the assessment year at issue. Cal. Rev. & Tax. Code §§ 741-744.

The Counties are responsible for the collection of state-assessed property taxes. On or before July 15 of any assessment year, the Board must transmit to each

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brief, the State of Ohio explained that one of its reasons for supporting the petition is that the resolution of the issue of the scope of Congressional power under section 5 of the Fourteenth Amendment has been a recurring issue for the lower federal courts. With regard to whether the 4-R Act can be deemed a valid exercise of section 5 enforcement power, there has been a divergence of opinions. *Compare Oregon Short Line, Wheeling & Lake Erie Ry. v. Pub. Util. Comm'n*, 141 F.3d 88 (3rd Cir. 1998), and *Fox River Valley R.R. v. Dept. of Revenue*, 863 F.Supp. 893 (E.D. Wisc. 1994), *with Union Pacific R.R. v. State of Utah*, 996 F.Supp. 1358 (D. Utah 1997), and *Union Pacific R.R. v. Burton*, 949 F.Supp. 1546 (D. Wyo. 1996); *but see CSX Transp., Inc. v. Board of Pub. Works*, 138 F.3d 537 (4th Cir. 1998), *cert.den.* ---- U.S. ----, 119 S. Ct. 63 (1998)[Court need not determine in this case whether 4-R Act is remedial legislation to enforce Equal Protection clause of Fourteenth Amendment or substantive legislation that defines the Amendment's restrictions on the states].

County auditor an estimate of the total value of state-assessed property. Cal. Rev. & Tax. Code § 755. By July 31, the Board must transmit the assessment roll to County auditors. Cal. Rev. & Tax. Code § 756. The County auditors prepare tax calculations and transmit the rolls to the County tax collectors, and the County tax collectors collect the taxes. Cal. Rev. & Tax. Code §§ 2601, 2602 and 2603.

Railroads have a state court remedy for the refund of property taxes. Cal. Rev. & Tax. Code § 5148. Judicial review in these suits for refund is *de novo*. Cal. Rev. & Tax. Code § 5170.

B. **Proceedings Below.**

Santa Fe and other railroads are the plaintiffs in 4-R Act cases that have been consolidated under one master case number in the United States District Court for the Northern District of California since 1981. Plaintiffs in all these cases have asserted that the Board's classification, valuation, and assessment of certain railroad property violated the federal 4-R Act.

Following this Court's decision in *Seminole Tribe*, the Board filed a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss all of the remaining 4-R Act cases. Santa Fe and another plaintiff filed motions for summary judgment and to amend their complaints to include a separate cause of action against the defendant Counties, to add the individual Board Members as defendants pursuant to the doctrine of *Ex Parte Young*, and to allege that the 4-R Act was enacted pursuant to the Fourteenth Amendment as well as the Interstate Commerce Clause. At the time, Santa Fe's pending cases involved the Board's escape assessment for the 1991 tax year, and its assessment for the 1993 tax year, of nonunitary property subject to 4-R Act relief.

On October 28, 1997, the district court issued an order regarding all the parties' motions. Appendix B, pp. 1-25. With regard to the Board's motion to dismiss, the

court ruled that, in enacting the 4-R Act, Congress expressly intended to abrogate the states' Eleventh Amendment immunity, but its use of the Interstate Commerce Clause to abrogate that immunity was not a valid exercise of Congressional power. Appendix B, pp. 13-15, 19, 21, 24, and 25. However, despite its determination that it lacked subject matter jurisdiction and its dismissal of the other pending cases, the court granted Santa Fe's motions for summary judgment. Appendix B, pp. 24-25. The court found that it was bound by a final judgment on the merits that had previously been entered in favor of Santa Fe with respect to earlier tax years.

The district court entered its judgments in favor of Santa Fe (and in favor of the Board in the other pending cases) on February 3, 1998. Appendix, pp. 26 and 27. The court later denied the Board's motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the Santa Fe judgments. Appendix B, p. 28. The Board filed timely notices of appeal on June 15, 1998.

On March 23, 1998, the Ninth Circuit issued its opinion in *Oregon Short Line*, holding that the 4-R Act was appropriate legislation to enforce the Equal Protection Clause. Appendix C. Based on that decision, Santa Fe thereafter filed a motion for summary affirmance, relying upon Ninth Circuit Rule 3-6. The Ninth Circuit granted Santa Fe's motion on November 13, 1998, and entered judgment affirming the district court's judgments in favor of Santa Fe. Appendix A.[2/]

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2. The other railroad plaintiffs appealed from the district court's February 3rd judgments dismissing their 4-R Act suits. On July 6, 1998, the Ninth Circuit granted the motion of Southern Pacific Transportation Company for summary disposition, vacated the district court's judgments, and remanded for further proceedings consistent with the *Oregon Short Line* case.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND THREATENS LIMITLESS CONGRESSIONAL ABROGATION OF ELEVENTH AMENDMENT IMMUNITY.

Apparently relying on its recent ruling in *Oregon Short Line*, the Ninth Circuit granted a motion to summarily affirm the judgment of the district court, based on the proposition that the district court had subject matter jurisdiction to enter the judgments in favor of Santa Fe despite the Board's assertion of Eleventh Amendment immunity from suit. In *Oregon Short Line*, and impliedly in this case, the Ninth Circuit ruled that Congress properly abrogated the States' Eleventh Amendment immunity in the 4-R Act, because the Act is appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. The Ninth Circuit's decision is inconsistent with this Court's precedent prescribing the test for congressional abrogation of Eleventh Amendment immunity under the Fourteenth Amendment. It expands Congress' ability to abrogate the States' immunity to statutes that are not based on a valid exercise of power.[3]

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3. Santa Fe's motion for summary affirmance was based solely on the *Oregon Short Line* decision. In *Oregon Short Line*, the Ninth Circuit preliminarily ruled that the *Seminole Tribe* test was to be applied retroactively to the case pending before it. 139 F.3d at 1265. That part of the Ninth Circuit's ruling in *Oregon Short Line* is consistent with this Court's precedent that a rule of federal law, once

As this Court ruled in *Seminole Tribe*, an attempted congressional abrogation of States' Eleventh Amendment immunity cannot be upheld under the Commerce Clause. 517 U.S. at 71-74. Only the Fourteenth Amendment supports a federal statute's abrogation of immunity, provided that Congress acts "pursuant to a valid exercise of power" under section 5 of that amendment. 517 U.S. at 55. The 4-R Act was not enacted pursuant to a valid exercise of power under the Fourteenth Amendment.

The 4-R Act explicitly prohibits conduct by State and local authorities which "unreasonably burden[s] and discriminate[s] against interstate commerce...." 49 U.S.C. § 11501. As this Court and the Ninth Circuit, itself, have observed, the purpose of the 4-R Act was to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987); see *Trailer Train Co.*

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announced and applied to the parties to a controversy, is the controlling interpretation of federal law and must be given full retroactive effect in all non-final cases in all courts adjudicating federal law. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 96-97 (1993). However, the Ninth Circuit's retroactivity ruling in *Oregon Short Line* is contrary to the district court's granting of Santa Fe's summary judgment motions. Appendix B, pp. 24-25. The litigation of Santa Fe's 1991 escape assessment and 1993 assessment was still pending on March 27, 1996, when this Court issued the *Seminole Tribe* decision. Appendix B, pp. 4, 24-25. Thus, the Board assumes that the Ninth Circuit in the present case based its summary affirmation upon all the bases provided by the Ninth Circuit for its decision in *Oregon Short Line*. Should this Court ultimately reverse the Ninth Circuit, the Board submits that the reversal should be accompanied by a remand to the Ninth Circuit to direct the district court to dismiss this case on the basis of proper application of *Seminole Tribe*.

v. State Board of Equalization, 697 F.2d 860, 865 (9th Cir. 1983). The policy supporting the 4-R Act, memorialized at 49 U.S.C. § 10101, describes the commercial and economic objectives aimed at unburdening interstate commerce by strengthening the rail transport infrastructure of this country through competition and the free market. The only mention made of prohibiting discrimination is with respect to these economic goals, and with a specific reference to "interstate commerce".

In light of the prior holdings of this Court, the Board submits that Congress cannot validly invoke its enforcement powers under section 5 of the Fourteenth Amendment merely because the word "discrimination" appears within the statutory text. This Court has held that the enforcement power under section 5 is not unlimited. See *City of Boerne v. Flores*, 521 U.S. ----, ----, 117 S.Ct. 2157, 2163, 138 L.Ed.2d 624 (1997). Statutes enacted pursuant to Congress' section 5 enforcement power must be remedial in nature and designed to prevent a constitutional infraction. *Id.* The 4-R Act is not a Congressional remedy for an equal protection violation.

Before the 4-R Act was enacted, this Court held that conventional discrimination between railroads and other classifications of property were not violations of the railroads' right to equal protection. See, e.g., *Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 367-371 (1940).[4] Without evidence that Congress, in enacting the 4-R Act, was acting within its section 5 power to enforce the Fourteenth Amendment, the 4-R Act

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4. "That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate--these are among the commonplaces of taxation and of constitutional law." *Browning*, 310 U.S. at 368.

cannot constitute such enforcement under that amendment. *City of Boerne*, 521 U.S. ----, ----, 117 S.Ct. at 2168-2169.

The 4-R Act does not contain a congressional expression that the Act was passed "to secure the rights under the Fourteenth Amendment." Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). Rather, the 4-R Act states that certain "acts unreasonably burden and discriminate against interstate commerce" and therefore violate the statute.

Prior to the passage of the 4-R Act, disparate classifications concerning railroads for taxation purposes did not violate the Equal Protection Clause. See *Browning*, 310 U.S. at 369 ("so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another ..."). Nevertheless, the Ninth Circuit characterizes such classifications as unconstitutional and sufficient to warrant congressional enactment of the 4-R Act under the Fourteenth Amendment Equal Protection Clause. *Oregon Short Line*, 139 F.3d at 1267. However, the two cases on which the Ninth Circuit relies, *Southern Railway Company v. Green*, 216 U.S. 400 (1909), and *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336 (1988), do not support its decision. Rather, these cases struck down certain egregious State tax practices because those practices rose to the level of constitutional violations of the Equal Protection Clause.

Southern Railway involved the State of Alabama's imposition of a new, additional, and special tax on foreign corporations that was not imposed on domestic corporations conducting the same type of railroad business. 216 U.S. at 412, 416-418. This Court held that the challenged tax was an arbitrary selection that could not be justified by calling it a classification. 216 U.S. at 417. Similarly, in *Allegheny Pittsburgh Coal*, this Court found that over a period of 10 years, the Webster County

tax collector engaged in intentional and systematic undervaluation of neighboring coal fields comparable to that of the petitioners, while the petitioners' property was valued at from 8 to 35 times more. 488 U.S. at 344-346. The Court found that this undervaluation of comparable property denied petitioners equal protection of the laws. 488 U.S. at 346.

Unlike the taxes imposed in *Southern Railway* and *Allegheny Pittsburgh Coal*, the acts that unreasonably burden and discriminate against interstate commerce, as determined in the 4-R Act, may not be so arbitrary or egregious as to rise to the level of a constitutional violation under the Equal Protection Clause. As this Court stated in the *City of Boerne* case:

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce", not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." 521 U.S. at ----, 117 S.Ct. at 2164.

Congress cannot make constitutional classifications unconstitutional, even if it can make such classifications unlawful. *City of Boerne*, 521 U.S. ----, 117 S.Ct. at 2163-2164. The 4-R Act prohibited long-standing, constitutionally permissible discriminatory taxation practices. While Congress has such powers under the Commerce Clause, it could not make such discrimination unconstitutional under the Equal Protection Clause. Moreover, it should not be inferred, solely for the purpose of circumventing the States' Eleventh Amendment immunity, that the Act is legislation to enforce the Equal Protection Clause. See *Quern v. Jordan*, 440 U.S. 332, 342-345 (1979). When Congress has not expressly articulated its intent to legislate pursuant to the

Fourteenth Amendment, courts should not "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State School v. Halderman*, 451 U.S. 1, 15-16 (1981).

The Ninth Circuit's permissive test for implicit abrogation of Eleventh Amendment immunity creates a grave danger of limitless congressional and judicial overrides of the States' immunity from suit in federal court. Under the Ninth Circuit's reasoning in *Oregon Short Line*, 139 F.3d at 1266, a federal court is free to find that Congress abrogated Eleventh Amendment immunity under the Fourteenth Amendment by enacting a statute that prohibits conduct which is not itself unconstitutional, so long as the court determines that the effect of the statute can be expected, under at least some circumstances, to result in enforcement of a Fourteenth Amendment guarantee. Significantly, the Ninth Circuit found it unnecessary in *Oregon Short Line* to determine whether the railroad had been deprived of any Fourteenth Amendment guarantees.

Without a constitutional infraction of the Fourteenth Amendment, there is no issue to address concerning whether the section 5 enforcement power can be employed to abrogate the States' Eleventh Amendment immunity. Thus, in the 4-R Act, Congress could not have been acting to redress a Fourteenth Amendment injury, for no Fourteenth Amendment injury existed. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at ----, 117 S.Ct. at 2164. Accordingly, after this Court's decision in *Seminole Tribe*, and in the absence of any other legitimate constitutional grant of power, the congressional intent to abrogate the States' immunity under the 4-R Act cannot be upheld as enacted pursuant to a valid exercise of power. The Ninth Circuit's test for validity under section

5 of the Fourteenth Amendment, employed in *Oregon Short Line* and in the present case, is so permissive, "it is difficult to conceive of a principle that would limit congressional power." *City of Boerne*, 521 U.S. at ----, 117 S.Ct. at 2168. This Court should grant the petition to curtail the Ninth Circuit's permissive test for congressional abrogation under the Fourteenth Amendment.

CONCLUSION

In *Seminole Tribe* this Court ruled that the Fourteenth Amendment is the sole source of Congressional power to abrogate unilaterally the States' Eleventh Amendment immunity from suit in federal courts. *Seminole Tribe* teaches that the Commerce Clause does not grant Congress the power to abrogate Eleventh Amendment immunity, and makes clear that Congress' power to abrogate is limited.

The Ninth Circuit's decision radically expands congressional abrogation authority. Under the Ninth Circuit's reasoning, a federal statute, such as the 4-R Act, intended to ameliorate Commerce Clause concerns, can be linked to the Fourteenth Amendment simply by a congressional reference to the word "discrimination", even if the discrimination does not violate Equal Protection guarantees. The Ninth Circuit's reasoning emasculates the essential teaching of *Seminole Tribe*. The petition should be considered with the pending petition in *State Board of Equalization of the State of California v. Southern Pacific Transportation Company, et al.*, No. 98-584, and both should be granted to ensure the vitality of that important decision and to curtail further encroachment into States' Eleventh Amendment immunity.[5]

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5. This Court's recent grants of four petitions for writs of *certiorari* indicate the importance of resolving the question of the scope of Congressional power to abrogate States' Eleventh Amendment immunity by enacting statutes pursuant to Article I powers. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 131 F.3d 353 (3rd Cir. 1997)[Trademark Remedy Clarification Act, Pub.L. No. 102-542, 102 Stat. 3567 (1992) amending Lanham Act (U.S. Supreme Court Docket No. 98-149)]; *Kimel v. State of Florida, Board of Regents*, 139 F.3d 1426 (11th Cir. 1998)[Age Discrimination In Employment Act, 29 U.S.C. §§ 621 *et*

Dated: February 10, 1999.

Respectfully submitted,

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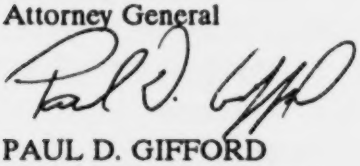

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seq. (U.S. Supreme Court Docket Nos. 98-791 and 98-796)]; *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 148 F.3d 1343 (Fed. Cir 1998)[Patent & Plant Variety Protection Remedy Clarification Act, Pub.L. No. 102-560, 102 Stat. 4230 (1992) amending Patent Act (U.S. Supreme Court Docket No. 98-531)]. Because the taxation authority is a traditional state power that is recognized as central to sovereignty, *Department of Revenue, Oregon v. ACF Industries, et al.*, 510 U.S. 332, 344-345 (1994); see also, *Arkansas v. Farm Credit Services of Cent. Arkansas*, 520 U.S. 821, 117 S.Ct. 1776, 1780 (1997), and cases cited therein ["The power to tax is basic to the power of the State to exist"], the Board submits that it is at least equally important to resolve this question with regard to the 4-R Act.

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 98 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX B

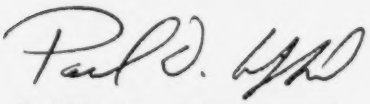
APPENDIX C

APPENDIX D

Dated: March 4, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General



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APPENDIX A

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

THE ATCHISON TOPEKA AND SANTA FE RAILWAY COMPANY,	) Nos. 98-16128) 98-16139) 98-16375
Plaintiff-Appellee,	) DC# CV-89-4030) DLJ) Northern California
v.	)
CALIFORNIA STATE BOARD OF EQUALIZATION	) ORDER
Defendant-Appellant,	
FRESNO COUNTY; et al.,	
Defendants.	

Before: FARRIS, BRUNETTI and SILVERMAN, Circuit Judges

Appellee's motion to consolidate is granted. Accordingly, the Clerk shall consolidate appeal nos. 98-16128, 98-16139 and 98-16375.

Appellee's unopposed motion for summary affirmance of these consolidated appeals is granted. *See* 9th Cir. Rule 3-6(a). The district court judgment is affirmed.

The parties' joint motion to modify the briefing schedule is denied as moot.

AFFIRMED

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-16128
CT/AG#: CV-89-04030-DLJ

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Plaintiff - Appellee

v

CALIFORNIA STATE BOARD OF EQUALIZATION

Defendant - Appellant

and

FRESNO COUNTY; KERN COUNTY; KINGS COUNTY; LOS ANGELES COUNTY; MADERA COUNTY, ALAMEDA COUNTY, MERCED COUNTY, TULARE COUNTY, ORANGE COUNTY, RIVERSIDE COUNTY, SAN BERNARDINO COUNTY, SAN DIEGO COUNTY, SAN FRANCISCO CITY AND COUNTY, SAN JOAQUIN COUNTY, STANISLAUS COUNTY; ALAMEDA COUNTY; CONTRA COSTA COUNTY; MERCED COUNTY; ORANGE COUNTY; COUNTY OF RIVERSIDE; COUNTY OF SAN BERNARDINO; COUNTY OF SAN DIEGO; SAN FRANCISCO COUNTY; COUNTY OF SAN JOAQUIN; STANISLAUS COUNTY: TULARE COUNTY

Defendants

NO. 98-16139
CT/AG#: CV-95-03532-DLJ

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Plaintiff - Appellee

CALIFORNIA STATE BOARD OF EQUALIZATION

Defendant - Appellant

and

FRESNO COUNTY; KERN COUNTY; KINGS COUNTY; LOS ANGELES COUNTY; MADERA COUNTY, ALAMEDA COUNTY, MERCED COUNTY, TULARE COUNTY, ORANGE COUNTY, RIVERSIDE COUNTY, SAN BERNARDINO COUNTY, SAN DIEGO COUNTY, SAN FRANCISCO CITY AND COUNTY, SAN JOAQUIN COUNTY, STANISLAUS COUNTY; ALAMEDA COUNTY; CONTRA COSTA COUNTY; MERCED COUNTY; ORANGE COUNTY; COUNTY OF RIVERSIDE; COUNTY OF SAN BERNARDINO; COUNTY OF SAN DIEGO; SAN FRANCISCO COUNTY; COUNTY OF SAN JOAQUIN; STANISLAUS COUNTY; TULARE COUNTY

Defendants

NO. 98-16375
CT/AG#: CV-81-04365-DLJ

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TRAILER TRAIN COMPANY

Plaintiffs - Appellees

CALIFORNIA STATE BOARD OF EQUALIZATION

Defendant - Appellant

and

FRESNO COUNTY; KERN COUNTY; KINGS COUNTY; LOS ANGELES COUNTY; MADERA COUNTY, ALAMEDA COUNTY, MERCED COUNTY, TULARE COUNTY, ORANGE COUNTY, RIVERSIDE COUNTY, SAN BERNARDINO COUNTY, SAN DIEGO COUNTY, SAN FRANCISCO CITY AND COUNTY, SAN JOAQUIN COUNTY, STANISLAUS COUNTY; CONTRA COSTA COUNTY; ALAMEDA COUNTY; MERCED COUNTY; ORANGE COUNTY; COUNTY OF RIVERSIDE; COUNTY OF SAN BERNARDINO; COUNTY OF SAN DIEGO; SAN FRANCISCO COUNTY; COUNTY OF SAN JOAQUIN; STANISLAUS COUNTY; TULARE COUNTY

Defendants

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered November 13, 1998

APPENDIX B

SOUTHERN PACIFIC, TRANSPORTATION CO., Plaintiffs, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	No. C-89-3603 DLJ
THE ATCHISON TOPEKA & SANTA FE RAILWAY CO., Plaintiff, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	Nos. C-89-4030 DLJ C-95-3532 DLJ
	No. C-94-1199 DLJ
NAPA VALLEY WINE TRAIN, INC., and STOCKTON TERMINAL & EASTERN R.R. CO., Plaintiffs,	Master Consolidated No. C-81-4365 DLJ ORDER

v.)
)
STATE BOARD OF)
EQUALIZATION, et al.,)
)
Defendants.)

On July 18, 1997, the court heard argument on the following motions: (1) the State Board of Equalization's motion to dismiss; (2) Southern Pacific's motion for summary judgment; (3) Santa Fe's motion for summary judgment regarding its 1991 escape assessment (4) Santa Fe's motion for summary judgment regarding its 1993 NURPEFAR assessment; (5) the Wine Train plaintiffs' motion for summary judgment; (6) Southern Pacific's motion for leave to amend; and (7) Santa Fe's motion for leave to amend.

Paul J. Mooney appeared on behalf of Southern Pacific and Santa Fe; Terrence J. Benshoof appeared for the Wine Train plaintiffs; Marguerite C. Stricklin appeared for the State Board of Equalization; and Kevin L. Norris appeared on behalf of the County defendants.

Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby rules as follows:

I. BACKGROUND

These consolidated cases all arise out of complaints alleging that defendants State Board of Equalization ("the Board") and various California counties ("the Counties") violated § 306(1)(d) of the federal Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act") (codified in part at 49 U.S.C. U 11503).[1/] Plaintiffs are the following railroads: The Atchison, Topeka & Santa Fe Ry. Co. ("Santa Fe") (Case Nos. C-89-4030 DLJ and C-95-3532

1. In the latest recodification of the 4-R Act, effective January 1, 1996, 49 U.S.C. § 11503 was renumbered § 11501.

DLJ); Southern Pacific Transportation Co. ("Southern Pacific") (Case No. C-89-3603 DLJ); Napa Valley Wine Train, Inc., Stockton Terminal & Eastern R.R. Co., and Santa Maria Valley Railroad Co. (collectively "the Wine Train plaintiffs:) (Case No. C-94-1199 DLJ). In each case, plaintiffs challenge the Board's assessment of a tax on property classified by the Board as "non-unitary railroad property eligible for 4-R Act relief" ("NURPEFAR").[2/]

Section 306 of the 4-R Act prohibits states and their subdivisions from enacting certain taxation schemes that discriminate against railroads. See *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843, 846 (1994). Specifically, § 306(1) provides, in relevant part:

> [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

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2. The two different categories of NURPEFAR at

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

4-R Act § 306(1).

A. The Santa Fe Cases

In 1993, the Court held a trial in Case No. C-89-4030 DLJ. Following the trial, the Court found that the board had engaged in discriminatory classification and taxation of Santa Fe's NURPEFAR in violation of § 306(1)(d). An Order to this effect was filed on June 7, 1994, followed by Findings of Fact and Conclusions of Law filed on September 7, 1994. On September 12, 1994, the Court entered the Partial Judgment submitted by Santa Fe, pursuant to which defendants were" permanently enjoined from collecting or seeking to collect any taxes on the Subject [NURPEFAR] Property as defined in the court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992." A Modified Partial Judgment was filed on April 24, 1995 in order to correct an incorrect amount set forth in the original judgment.

The Board filed a notice of appeal in this case on May 23, 1995. On June 29, 1995, the Board sent Santa Fe a notice of a non-unitary escape assessment for Santa Fe's commuter property for 1991, stating that the Counties would not attempt to collect any taxes based on this escape

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issue here have previously been labelled "restructuring plan property" and "commuter property.

assessment pending the outcome of the Board's appeal to the Ninth Circuit in Case No. C-894030 DLJ. Nonetheless, on October 4, 1995, Santa Fe filed a new case, C-95-3532 DLJ, alleging that the escape assessment for 1991 constituted a discriminatory tax in violation of § 306. At the time it filed the new case, Santa Fe also filed a motion for order directing the Board to show cause why it should not be held in contempt for issuing the escape assessment. In its motion, Santa Fe alleged that the 1991 escape assessment violated the injunction embodied in the Partial Judgment and Modified Partial Judgment in Case No. C-89-4030 DLJ. On February 26, 1996, the Court denied Santa Fe's contempt motion. Finally, on January 6, 1997, the Ninth Circuit dismissed the board's appeal in Case No. C-89-4030 DLJ as untimely.

B. The Southern Pacific Case

A trial was scheduled for December 1994 with respect to Southern Pacific's allegations that defendants violated § 306(d)(1) in assessing Southern Pacific's NURPEFAR. However, counsel for Southern Pacific, who is also counsel for Santa Fe, notified the Court on November 16, 1994 that a trial was not necessary, because the parties had come to an agreement. First, the parties agreed to enter a stipulated permanent injunction that would apply for the 1993 and 1994 tax years to the restructuring plan NURPEFAR. Second, they agreed to a stipulated preliminary injunction as to the "line sale" NURPEFAR which would also apply for the 1993 and 1994 tax years. Further preliminary injunctions were later entered with respect to Southern Pacific's NURPEFAR for the tax years 1995 and 1996. These stipulated injunctions effectively precluded any assessment for Southern Pacific's NURPEFAR pending the resolution on appeal of the related issues in the preceding Santa Fe case.

C. The Wine Train Case

In April 1994, the Napa Valley Wine Train, Inc. and the Stockton Terminal & Eastern Railroad Company filed an action, C-94-1199 DLJ, seeking relief for the 1993 tax year

and years thereafter. In 1995, the Court granted in part a motion to amend the complaint to add the Santa Maria Valley Railroad Company as a plaintiff, and Santa Barbara County as a defendant. However, because Santa Maria had already paid its 1993 taxes, it was granted leave only to seek relief for the 1994 tax year.

On June 20, 1995, following negotiations to which the Wine Train plaintiffs were not a party, the Court entered a Stipulated Order and Permanent injunction in Master Consolidated Case No. C-81-4365 DLJ, setting forth the formula for calculating the equalization ratio for each tax year beginning with 1994. The Board also used this formula to determine ratios for years prior to 1994. The plaintiffs in the Wine Train case were not among the designated parties to which the Stipulated Order and Permanent Injunction would apply. Nevertheless, the Wine Train plaintiffs now request that the Court enjoin the Counties from collecting taxes based on the 1990 through 1994 assessments of their property to the extent that those assessments are in excess of the stipulated ratios. Plaintiffs also seek a refund of previously overpaid taxes from the Counties.

D. The Present Motions

In 1996, the United States Supreme Court decided the case of *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). The Court's opinion in that case severely limited Congress' ability to authorize suits against a state in federal court without the consent of the state. Based on this decision, the Board now moves, pursuant to Fed. R. Civ. P. 12(b)(1), to dismiss all of the remaining cases in this consolidated action for lack of subject matter jurisdiction. Concurrently, plaintiffs Santa Fe and Southern Pacific move to amend their complaints to name the individual Board members as defendants and to state separate claims against the Counties. Finally, plaintiffs in all of the present cases move for summary judgment on the ground that this Court has already found the Board's NURPEFAR assessments to

be unlawful.

On July 18, 1997, the court held a hearing on all of the pending motions. On July 28, 1997, the Court requested supplemental briefing regarding certain issues that arose at the hearing. Having reviewed the supplemental briefs filed by the parties, the Court now rules as follows.

II. DISCUSSION

The Board argues that this case must be dismissed for lack of subject mater jurisdiction, as the Eleventh Amendment to the United States Constitution provides the Board, as an arm of the state, with immunity from suit in federal court. Plaintiffs respond that § 306 of the 4-R Act was a valid exercise of Congress' power to abrogate the state's Eleventh Amendment sovereign immunity with respect to challenges to discriminatory taxation of railroads.[3/] Alternatively, plaintiffs contend that if the Board is immune from suit, the individual Board members still may be sued under the doctrine of *Ex Parte Young*. Finally, plaintiffs argue that even if the Court dismisses the Board and its members from this suit, the suit may be maintained against the remaining County defendants.

A. Eleventh Amendment Immunity

The Eleventh Amendment to the U.S. Constitution bars from the federal courts suits against a state by private citizens. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

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3. Plaintiff Napa Valley Wine Train also argues that the Board is not actually an arm of the state, and therefore is not entitled to sovereign immunity. This argument fails because the Ninth Circuit has explicitly recognized that the California State Board of Equalization is a state agency, entitled to Eleventh Amendment immunity. *See V. O. Motors* v. *State Board of Equalization*, 691 F.2d 871, 872-73 (9th Cir. 1982).

Unless a state has waived its Eleventh Amendment immunity or Congress has validly abrogated it, a state cannot be sued regardless of the relief sought. *See Atascadero*, 473 U.S. at 238; *see also Green v. Mansour*, 474 U.S. 64, 68 (1985).

The Board claims that it is entitled to Eleventh Amendment immunity in this case pursuant to the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). Prior to *Seminole*, it was well settled that a federal district court had jurisdiction over state defendants alleged to have violated the 4-R Act by discriminatory taxation of railroads. However, *Seminole* reexamined Congress' authority to grant federal courts jurisdiction over nonconsenting state defendants. Specifically, in *Seminole* the Supreme Court held that the Indian Commerce Clause did not authorize congress to enact legislation granting federal courts jurisdiction over a nonconsenting State. *Seminole*, 116 S.Ct. at 1119. The Court held that Congress only has the power to abrogate states' Eleventh Amendment immunity pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment. Id. at 1125. In the case at hand, the Board argues that because the 4-R Act was not enacted pursuant to the Fourteenth Amendment, *Seminole* compels the conclusion that the Eleventh Amendment protects the Board from suit in federal court.

As a preliminary matter, plaintiffs argue that the issue of sovereign immunity must be raised as an affirmative defense. Because the Board has failed to do so, plaintiffs contend that the Board's present motion to dismiss for lack of subject matter jurisdiction is premature.

The exact nature of the Eleventh Amendment jurisdictional bar has never been precisely defined. *See Union Pacific R.R. Co. v. Burton,* 949 F.Supp. 1547, 1551 (D. Wyo. 1996) (citing Wright, Miller, and Cooper, Federal Practice and Procedure, § 3524 (2d ed. 1984)). While the Ninth Circuit has indicated that Eleventh Amendment

immunity should be treated as an affirmative defense which can be waived, *Itsi TV Productions* v. *Agricultural Associations*, 3 F.3d 1289, 1291-92 (9th Cir. 1993), the *Seminole* decision requires, where a state is entitled to Eleventh Amendment immunity, that the case be dismissed for lack of jurisdiction. *Seminole*, 116 S. Ct. at 1132 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Thus, the Court finds, in light of the *Seminole* decision, that the question of the Board's Eleventh Amendment immunity implicates jurisdictional concerns which are ripe for consideration at this stage.

Accordingly, the Court now turns to the question of whether Congress, by enacting the 4-R Act, has abrogated the Board's state sovereign immunity in the present case.

1. Abrogation for Eleventh Amendment Immunity

Congress may abrogate the states' Eleventh Amendment sovereign immunity if it has (1) unequivocally expressed its intent to abrogate the immunity and (2) acted pursuant to a valid exercise of power. *Seminole*, 116 S. Ct. at 1123; *see also Green*, 474 U.S. at 68. Here, there is no dispute that Congress, in drafting the 4-R Act, expressly intended to abrogate the states' sovereign immunity with respect to discriminatory tax rates and assessments applied to rail transportation property. *See* 49 U.S. § 11501(c); *see also ACF Industries, Inc.*, 114 S. Ct. at 850-51; *Trailer Train Co.* v. *State Board of Equalization*, 697 F. 2d 860, 865-66 (9th Cir. 1983). Thus, the issue left to be decided by this Court is whether Congress passed the 4-R Act pursuant to a valid exercise of power.

Whether a congressional exercise of power was valid turns upon whether the statute in question was passed pursuant to a constitutional provision granting Congress the power to abrogate. *Seminole*, 116 S. Ct. at 1125. In *Seminole*, the court held that Congress only has the power to

abrogate states' Eleventh Amendment immunity pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment. Id. at 1125 (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)). In so ruling, the Court overturned *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), which held that the Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity. *Seminole*, 116 S. ct. at 1125, 1128. Consequently, in the present case, unless the Court finds that § 306 of the 4-R Act was passed pursuant to Congress' Fourteenth Amendment enforcement power, the court must hold that Congress' attempt to abrogate state sovereign immunity under the 4-R Act was invalid.

a. The 4-R Act was an Exercise of Congress' Commerce Power

As a starting point, it is undisputed that Congress was in fact acting pursuant to its power under the Commerce Clause in enacting the 4-R Act. The Supreme Court has recognized that the 4-R Act's purpose, as stated in the Congressional declaration of policy, is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). As just one of the means to achieve its goal of furthering railroad financial stability, Congress enacted § 306, prohibiting discriminatory State and local taxation of common and contract carrier transportation property." See *Trailer Train Co.*, 697 F.2d at 865 (quoting S. Rep. No. 630, 91st Cong., 1st Sess. (1969)).[4/]

4. Before passing § 306 as part of the comprehensive 4-R Act, Congress had given consideration to numerous bills containing language virtually identical to that of § 306. The Ninth Circuit has indicated that it is proper for courts to rely on the legislative history of these prior bills to assist in interpreting § 306. See *Trailer Train Co.*, 697

Despite the fact that the 4-R Act is obviously grounded in Congress' commerce power, plaintiffs urge the Court to find that the Act can also be viewed as a valid exercise of Congress' Fourteenth Amendment enforcement power. Plaintiffs are correct that the lack of an explicit reference by Congress to the Fourteenth Amendment in passing the statute is not dispositive. "The question of the constitutionality of action taken by taken by Congress does not depend upon recitals of the power which it undertakes to exercise." *See Woods* v. *Miller*, 333 U.S. 138, 144 (1948). There is in fact no requirement that congress recite the words "section 5" or "Fourteenth Amendment" or equal protection" in order to exercise its power under § 5 of the Fourteenth Amendment. *EEOC* v. *Wyoming*, 460 U.S. 226, 244 n. 18 (1983); *see also Fullilove* v. *Klutznick*, 448 U.S. 448, 476-78 (1980). Rather, it is the Court's task to decipher whether Congress has enacted legislation pursuant to § 5. *See Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 698 (1st Cir. 1983).

In order to fmd that Congress acted pursuant to its Fourteenth Amendment enforcement power, the Court must be able to discern some "legislative purpose or factual predicate" that supports the exercise of that power. *Id.* (citing *EEOC* v. *Wyoming*, 103 S. Ct. at n. 18). The Court's inquiry must focus on whether or not the objectives of the legislation are within the scope of Congress' power under § 5. *Ramirez*, 715 F.2d at 698 (citations omitted); *see also Elrod*, 674 F.2d at 604, 608-09 (holding that courts must determine, by looking to the history and structure of the legislation, whether the purpose of the statute was within Congress' § 5 enforcement power); *see also Timmer* v. *Michigan Dept. Commerce*, 104 F.3d 833, 840 (6th Cir. 1997). *But see Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 15-16 (1981) (urging courts not to "quickly attribute" to Congress an unstated intent to act

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F.2d at 865 n. 6 (citation omitted).

pursuant to § 5).

b. Congress Did Not Enact the 4-R Act Pursuant to its Fourteenth Amendment Enforcement Power

The Court is aware of no post-*Seminole* Ninth Circuit decision to guide its inquiry into whether the 4-R Act is within Congress' Fourteenth Amendment enforcement power.[5/] Thus, the Court is left to look to the decisions of courts in other circuits regarding the validity of other statutes. For instance, in *Wison-Jones* v. *Caviness*, 99 F.3d 203, 210 (6th Cir. 1996), amended at 107 F.3d 358 (9th Cir. 1997), the Sixth Circuit was required to determine whether the Fair Labor Standards Act ("FLSA") could be regarded as an enactment to enforce the Fourteenth Amendment Equal Protection Clause.

In making its determination, the court looked to the factors set out in *Katzsenback* v. *Morgan*, 384 U.S. 641 (1966) (upholding the Voting Rights Act as appropriate to enforce the Fourteenth Amendment). Thus, the inquiry made by the Court was whether the statute

> (1) may be regarded as enactment to enforce the Equal Protection Clause, (2) whether it is 'plainly adapted to that end,' and (3) whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'

Wilson-Jones, 99 F.3d at 209 (citing *Katzenbach*, 384 U.S. at 651 (quoting *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819)).

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5. *Union Pacific R.R. Co.* v. *Burton*, 949 F.Supp. 1546 (D. Wyo. 1996) is the only published post-*Seminole* decision this Court finds that directly addresses whether the 4-R Act is within Congress' Fourteenth Amendment enforcement power. In *Union Pacific*, the court rejected the position that the 4-R Act could have been enacted to enforce the Fourteenth Amendment. *Union Pacific*, 949 F. Supp. at 1554.

Focusing on the first of the *Katzenbach* factors, the court concluded that the FLSA could not be regarded as serving a Fourteenth Amendment purpose simply because it was aimed at remedying wage "discrimination" between state and private-sector employees. *Wilson-Jones*, 99 F.3d at 210. Rather, the court held that, in the absence of explicit comment by Congress, it would regard as an enactment to enforce the Equal Protection Clause, "only efforts to remedy discrimination against a class of persons that the Fourteenth Amendment jurisprudence has already identified as deserving special protection. " *Id.*

Plaintiffs here read cases such as *Wilson-Jones* to require that this court inquire into whether Congress could have passed the 4-R Act pursuant to its Fourteenth Amendment enforcement power. This appears to the Court to be the method espoused by the Supreme Court, as well as other circuit courts. Nonetheless, this Court questions the wisdom of an analytical approach which requires the Court to determine what Congress could have done, as opposed to what it did in fact do, or what it would do given the opportunity to reenact the statute in light of the Supreme Court's holding in *Seminole*. In any event, in the present case, regardless of which analytical framework is employed, the Court easily finds, for the following reasons, that there is no way in which the 4-R Act can be viewed as a valid exercise of Congress' power to enforce the Fourteenth Amendment Equal Protection Clause.

First, it is clear that the purpose of the 4-R Act as a whole was to protect interstate commerce. Strong evidence of this goal is found in the statute's statement of policy, where only one of the fifteen stated policies is "to prohibit unlawful discrimination." *See* 49 U.S.C. § 10101(12). All of Congress' other stated objectives in regulating the railroad industry are either commercial in nature or based on public health and safety concerns. This policy statement, combined with the Supreme Court's interpretation of the 4-R Act as a

commerce-related statute, *see Burlington Northern*, 481 U.S. at 457, leads the Court to find that the 4-R Act is in no way grounded in equal protection concerns. *See Union Pacific*, 949 F.2d at 1554.

The Court also finds that even if it were to follow plaintiffs' suggestion and analyze § 306 independent from the rest of the 4-R Act, the same conclusion would be reached. *Cf. Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977) (holding that the Equal Pay Act is severable from the wage and overtime provisions of the FLSA for purposes of Fourteenth Amendment analysis); *Timmer*, 104 F.3d at 842 (same); *EEOC* v. *Elrod*, 674 F.2d 601, 610 (7th Cir. 1982) (holding that the ADEA was a valid enactment under the Fourteenth Amendment enforcement power even though it was part of the FLSA).

Plaintiff's argue that § 306 is "fundamentally an anti-discrimination statue" in that it requires states to tax railroads on an equal basis with other commercial property. In making this argument, plaintiffs rely heavily upon the legislative history of § 306, which repeatedly speaks of the problem of state tax discrimination against railroads. However, plaintiffs can point to only a single reference to the Equal Protection Clause in this extensive legislative history. This reference is found in a Senate Commerce Committee report which includes testimony regarding federal district courts voiding certain discriminatory taxes on railroads as violative of the Equal Protection Clause of the Fourteenth Amendment. *See* S. Rep. No. 630, 91st Cong. 1st Sess. at 7 (1969).

The Board does not dispute that § 306 was enacted in response to discriminatory state taxation of railroads. Rather, the Board questions the significance to be attached to the mere use of the word "discrimination" in the statute and in the legislative history. The Board argues, and the Court agrees, that the mere recitation of the words "unequal and discriminatory taxation," do not render the 4-R Act, or §

306 standing alone, an equal protection statute.[6] As discussed above, the statute's purpose is clearly to protect railroads in interstate commerce. *See Union Pacific*, 949 F. Supp. at 1553-54; *see also Burlington Northern*, 481 U.S. at 457. Thus, § 306 of the 4-R Act cannot be regarded as an effort to remedy discrimination against a class of persons traditionally given protection under Fourteenth Amendment jurisprudence. *Cf. Wilson-Jones*, 99 F.3d at 210. The Court is aware of no case which would even suggest extending the reach of this traditional protection to a group of taxpayers comprised of business entities running railroads. If the court were to find in this case that § 306 could be regarded as an enactment to enforce the Fourteenth Amendment simply because it contained a talismanic reference to "discrimination," then Congress § 5 enforcement powers would be limitless, thereby stripping the Supreme Court's *Seminole* decision of any real meaning.

In sum, the Court finds that the purpose of the legislation at issue in this case is to strengthen the railroads' position in interstate commerce, rather than to cure invidious discrimination against a discrete group which has

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6. The Court notes that other courts have found that there is nothing in the language or the legislative history of the 4-R Act to suggest that equal protection analysis is to be applied to claims under the statute. *See, e.g., ABF Freight System, Inc.* v. *Tax Div. of Arkansas*, 787 F.2d 292 (8th Cir. 1986) (citing *Atchison, Topeka, & Santa Fe Railway* v. *Lennen*, 732 F. 2d 1495 (10th Cir. 1994)); *Arkansas-Best Freight Systems, Inc.* v. *Lynch*, 723 F.2d 365 (4th Cir. 1983); *Clinchfield Railroad* v. *Lynch*, 700 F.2d 126 (4th Cir. 1983).

traditionally been protected by the Fourteenth Amendment. *Accord Union Pacific*, 949 F.Supp. at 1553-54. Thus, the Court finds that neither the 4-R Act as a whole, nor § 306 by itself, was validly enacted pursuant to Congress' Fourteen Amendment enforcement power. Therefore, under *Seminole*, Congress' use of the commerce clause in this case overstepped its authority in expressly authorizing 4-R suits against states in federal court. As a result, this Court lacks subject matter jurisdiction over the Board in this case. Consequently, the Board's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) must be granted unless it can be established that the Board waived its sovereign immunity.

2. Waiver of Sovereign Immunity

Plaintiffs argue that even if the Board was entitled to sovereign immunity at the outset of this case, it has since waived that immunity. "The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero*, 473 U.S. at 241. A state's waiver of Eleventh Amendment immunity must generally be "unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (citation omitted). The Supreme Court has suggested, however, that Eleventh Amendment immunity may in some cases be forfeited by the state's failure to assert it. *See Blatchford* v. *Native Village of Noatak*, 111 S.Ct. 2578, 2584 n. 3 (1991) *see also Itsi*, 3 F.3d at 1291.

Plaintiffs contend that the Board has waived its immunity by litigating this case for sixteen years and stipulating to the various injunctions discussed above. However, as the Board points out, it was not actually entitled to sovereign immunity until last year, when the *Seminole* case was decided. In light of the fact that the Board had no challenge to this Court's jurisdiction until last year, the Court finds it difficult to see how the Board's appearance before this Court can be deemed a "voluntary" waiver of immunity.

In addition, in order for a state statute or constitutional provision to serve as a waiver of the state's Eleventh Amendment Immunity, it must specify the state's intention to subject itself to suit in federal court. *Atascadero*, 473 U.S. at 241-42 (emphasis added). Here, California Constit. Art. XIII, § 32 provides that only the state legislature may determine how and when the state may be sued with respect to collection of taxes. Statutes passed pursuant to this section provide that the sole remedy for challenging California taxes is a suit for refund. *See, e.g.*, Cal. Rev. & Tax. Code §§ 5140, et seq. Thus, California law provides no explicit waiver of sovereign immunity for suits challenging discriminatory taxes, such as the present case.

For the reasons stated above, the Court finds that the Board has not waived its sovereign immunity in this case, and must therefore be dismissed as a defendant. Having determined that the Board must be dismissed from the case, the Court must now decide whether the suit may proceed either against the individual Board members or against the County defendants alone.

B. *Ex Parte Young*

Plaintiffs, citing the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), contend that they can maintain their claims against the individual members of the Board. On this basis, plaintiffs Santa Fe and Southern Pacific have moved for leave to amend their present complaints.[7] The Wine Train plaintiffs do not similarly seek leave to proceed against the individual Board Members.

In *Ex Parte Young*, the Supreme Court held that the Eleventh Amendment does not bar a suit in federal court against a state official acting in violation of federal law. *Ex*

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7. Santa Fe has filed a motion for leave to amend only in Case No. C-89-4030 DLJ, and not in Case No. C-95-3532 DLJ regarding the 1991 escape assessment.

Parte Young, 209 U.S. at 159-60.[8] There are, however, limits on such suits. When a plaintiff brings a suit against a state official alleging a violation of federal law, a federal court may award prospective injunctive relief governing that official's future conduct, but may not award retroactive relief that requires the payment of funds from the state treasury. *See Edelman* v. *Jordan*, 415 U.S. 651, 667-69 (1974); *see also Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Natural Resources Defense Council* v. *California Department of Transportation*, 96 F.3d 420, 422 (9th Cir. 1996).

1. *Coeur d'Alene*

The Supreme Court recently reexamined the scope of the *Ex Parte Young* doctrine in *Idaho* v. *Coeur d 'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997). In that case, an Indian tribe and several of its members brought suit in federal court against the State of Idaho, state agencies, and state officials, alleging ownership of the banks and submerged lands of lake Coeur d'Alene. The Tribe sought a declaratory judgment, as well as an injunction prohibiting defendants from regulating the lands. The Ninth Circuit held that the State of Idaho and the state agencies were immune from suit; however, it found that the Tribe's claims could proceed against the state officials under the *Ex Parte Young* doctrine.

The Supreme Court reversed, holding the *Ex Parte Young* doctrine inapplicable. In reaching this decision, Justice Kennedy, joined by Chief Justice Rehnquist in the principal opinion, and joined in part by Justice O'Connor,

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8. In *Seminole*, the Court recognized the continuing viability of the *Ex Parte Young* doctrine. *See Seminole*, 116 S.Ct. at 1132-33. However, *Seminole* instructs courts to be wary of allowing a plaintiff to maintain a suit against a state official where "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Id.* at 1132.

Justice Scalia and Justice Thomas, concurring, stated as follows:

> To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction . . . . Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Coeur d'Alene, 117 S.Ct. at 2034.

These same five Justices also joined in concluding as follows:

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id. at 2043.

In reaching this conclusion, Justice Kennedy, in parts of the principal opinion joined only by Chief Justice Rehnquist, endorsed a case-by-case balancing test for determining when the fiction of *Ex Parte Young* should apply. The factors to be considered under this balancing approach are as follows: (1) the availability of a state forum to hear the dispute; (2) the particular federal right at issue; and (3) the degree of

federal intrusion upon state sovereignty if the suit is allowed to proceed. *See Coeur d 'Alene*, 117 S.Ct. at 2035-38.

As stated above, Justice O'Connor, in a concurrence joined by Justice Scalia and Justice Thomas, agreed with the result reached in the principal opinion. However, the concurring Justices found that opinion to be "flawed in several respects. " *Coeur d 'Alene*, 117 S. Ct. at 2045 (O'Connor, J., Concurring). At its core, the concurring Justices' issue with the principal opinion is that it replaces a well-settled "straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" with a "vague balancing test." *Id.* at 2047. Thus, Justice O'Connor concludes as follows:

> While I do not subscribe to the principal opinion's reformulation of the appropriate jurisdictional inquiry for all cases in which a plaintiff invokes the *Young* doctrine, I nevertheless agree that the Court reaches the correct conclusion here. The *Young* doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State. Where a plaintiff seeks to divest the State of all regulatory power over submerged lands -- in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands - it simply cannot be said that the suit is not a suit against the State. I would not narrow our *Young* doctrine, but I would not extend it to reach this case. *Id.* at 2047.

Finally, in dissent, Justice Souter, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, notes that Justice O'Connor "wisely rejects the lead opinion's call for federal jurisdiction contingent on case-by-case balancing." *Id.* at 2048 (Souter, J., dissenting).

Upon reading the *Coeur d 'Alene* decision, it is apparent that seven Justices explicitly reject the case-by-case balancing

approach espoused by Justice Kennedy in the principal opinion. Accordingly, plaintiffs argue that the principal opinion has no precedential value. The Supreme Court holds that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....'" *Marks* v. *United States*, 97 S.Ct. 990, 993 (1977) (citing *Gregg* v. *Georgia* 96 S.Ct. 2909, 2933 (1976)).

In *Coeur d'Alene*, five Justices found *Ex Parte Young* inapplicable under the particular circumstances of that case. Those same five Justices endorsed parts of the principal opinion in which Justice Kennedy pronounced that the applicability of the *Ex Parte Young* doctrine depends to some degree upon the extent of the federal intrusion on state sovereignty. Because a majority of the Supreme Court appears to endorse this view, this Court will now consider in the present case the extent to which state sovereignty would be threatened by allowing an *Ex Parte Young* to proceed under the 4-R Act.

In the case before this Court, the state obviously has a strong interest with respect to its power to tax property. Taxation has repeatedly been recognized as a central sovereign power of the state. *See, e.g.*, *Arkansas* v. *Farm Credit Services of Central Arkansas*, 117 S.Ct. 1776, 1780 (1997) ("The State's interest in the integrity of their own processes is of particular moment respecting questions of state taxation."); ACF Industries, 114 S.Ct. 843, 850-51 (1994) (recognizing state taxation authority as central to state sovereignty). The Board now argues that if plaintiffs were to be afforded an *Ex Parte Young* remedy in this case, the state's sovereign interest in the administration and adjudication of its tax laws would be seriously impacted. Plaintiffs respond that are not seeking to interfere with the state's power to tax; rather they characterize the remedy they

seek as merely an order that the state not be allowed to impose an illegal, discriminatory tax.

The Court finds that California's power to assess property taxes in the manner it deems appropriate would be impacted severely if the Court were to allow plaintiffs to proceed with this case under the fiction of *Ex Parte Young*. In addition, Court finds that the power to tax at issue here is every bit as central to state sovereignty as Idaho's interest in the submerged lands in question in *Coeur d' Alene*. Consequently, the Court finds that the nature of the present case is such that a federal court should not involve itself in a challenge to state administrative action. *Cf. Coeur d'Alene*, 117 S.Ct. at 2037-38. Accordingly, the Court holds that plaintiffs may not maintain the present suit against the individual members of the Board under *Ex Parte Young*.[9/]

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9. Although the other two factors in the principal opinion's balancing test have not been embraced by a majority of the Supreme Court, the Court will briefly address their application to the present case.

First, state courts are available in this case to vindicate the federal rights at issue, as the 4-R Act explicitly grants state courts concurrent jurisdiction over suits challenging discriminatory tax assessments on railroad property. See 49 U.S.C. § 11501(c).

Second, state courts are as capable as federal courts of interpreting and enforcing the particular federal right at issue here, the right to be free from discrimination in interstate commerce. *Cf. Couer d'Alene* at 2037 ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism"). Thus, the Court finds that applying the *Couer d'Alene* factors in the present case would result in a finding that the *Ex Parte Young* doctrine is inapplicable.

2. Finality of the Board's Assessments

An issue also arose at the July 18, 1997 hearing as to whether plaintiffs were even seeking prospective injunctive relief, which has always been a prerequisite to maintaining an *Ex Parte Young* suit. On the one hand, plaintiffs argue that the injunction they seek against the collection of future taxes should indeed be considered prospective injunctive relief. On the other hand, the Board argues that plaintiffs are actually seeking retroactive relief regarding assessments for past tax years. The Board further contends that because the assessments are already complete and have been certified to the counties, there is no continuing violation of federal law to enjoin under *Ex Parte Young*. *Cf. Union Pacific*, 949 F. Supp. at 1555.

In order to resolve this issue, the court requested, and thereafter received, supplemental briefing as to the status of the assessment still at issue. According to plaintiffs, the Board's assessments never became final because plaintiffs filed petitions for reassessment for each tax year at issue.[10/] The Board, however, refers the Court to the California Revenue and Taxation Code for the relevant procedures regarding petitions for reassessment. The Board also submits copies of its decisions on the petitions for reassessment at issue here. *See* Board's Request for Judicial Notice.

Under California law, where a petition for reassessment is filed, the assessment does not become final until the earlier of the Board's decision upon the petition or December 31st of the assessment year at issue. *See* Cal. Rev. & Tax. Code §§ 741-744. The evidence submitted by the Board

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10. In the Southern Pacific case, tax years 1993, 1994, 1995, and 1996 are at issue. In the Santa Fe case, only 1993 remains at issue, as permanent injunctions have been entered for all other tax years.

indicates that in each of the tax years at issue here, the Board acted upon plaintiffs' petitions for reassessment prior to December 31st of each of the relevant tax years. In addition, the evidence shows that in each instance the Board voted upon the assessments in question prior to or on the same day as the relevant injunctions were entered in the suits before this Court.

The assessments at issue became final under California law on the date on which action was taken by the Board. Thus, the Court finds that plaintiffs are in fact seeking retroactive, rather than prospective injunctive relief with respect to the Board, despite the fact that they are seeking to prospectively enjoin collection of taxes by the Counties. Because any violation of federal law by the Board is complete once the assessments have been finalized, the Court finds that no *Ex Parte Young* remedy is available to plaintiffs against the individual Board members.

C. The County Defendants

Finally, plaintiffs argue that even if this suit is dismissed against the Board and its members, plaintiffs should be permitted to proceed against the Counties, which serve as the tax collectors for the state. The Counties, however, contend that the entire case should be dismissed in the event that the Board is no longer a party because the Board, as the assessor of the taxes in question, is an indispensable party.

Federal Rule of Civil Procedure 19 governs the mandatory joinder of parties to an action. The Court must conduct a two-step analysis in determining whether additional parties must be joined in an action. First, under Rule 19(a), the Court must determine if joinder is feasible and the additional parties are necessary. Second, if the Court determines that the parties are necessary but that joinder is not feasible, it must determine under Rule 19(b) whether the action may continue without the absent parties. The Court does not reach the Rule 19(b) analysis unless it

has decided that the parties are necessary under Rule 19(a). *Aguilar v. Los Angeles County*, 751 F.2d 1089, 1092 (9th Cir. 1985); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 (9th Cir. 1983).

1. The Board is a Necessary Party and Joinder is Not Feasible

Under the Rule 19(a) analysis, the Court first must determine whether joinder is feasible. Joinder is feasible if the party is subject to service of process and joinder will not deprive the Court of subject matter jurisdiction. Fed. R. Civ. P. 19(a); *Provident Tradesmen B. & T. Co. v. Patterson*, 88 S.Ct. 733, 737 (1968). As discussed above, the Court lacks subject matter jurisdiction over the Board, rendering joinder infeasible.

Next, the Court must determine whether the absent party is necessary. An absent party is necessary in two circumstances. First, if in the party's absence the Court is unable to accord complete relief to the parties present, the party is necessary. Fed. R. Civ. P. 19(a)(1). "Complete relief" in the context of Rule 19(a)(1) means that the existing parties can get meaningful recovery for their claims without multiple lawsuits on the same cause of action. *Northrop*, 705 F.2d at 1043. Second, an absent party is necessary if disposition of the case without that party would as a practical matter impair his ability to protect his interests, or would subject existing parties to multiple or inconsistent obligations. Fed. R. Civ. P. 19(a)(2); *see Aguilar*, 751 F.2d at 1089 (interpreting and applying Rule 19(a)(2)).

Plaintiffs' present suits challenge both their past tax assessments and the levying or collection on such assessments by the Counties as violations of § 306. It has been previously established in this case that the tax assessment/collection process works as follows. The Board is the entity which identifies, classifies, assesses, and values plaintiffs' property. The Board then informs the Counties of the assessed valuation for the subject property within their

boundaries, and informs the Counties of the value allocated to each tax rate area code appearing upon the roll of each county. The Counties, in turn, levy and collect property taxes for themselves and for each tax rate area code appearing on their rolls in accordance with the assessed values determined by the Board. *See* September 7, 1994 Order in Case No. C-89-4030 DLJ.

Given these circumstances, the Counties first argue that the Board is a necessary party to any § 306 suit because the Board must be available to defend the validity of its assessments. As explained above, in order to find a violation of § 306, the Court must necessarily find that the Board's valuations, upon which the Counties' levy and collection of taxes are based, were improper. Plaintiffs contend that this issue can be easily addressed if the Counties merely subpoena members of the non-party Board as witnesses in a suit challenging the assessments. However, the Court has serious problems with the idea of litigating the propriety of the state's tax assessments in a federal district court proceeding where the state is not even a party.

Moreover, the Court agrees with the Counties' argument that the Board is a necessary party because without the Board, the Counties are likely to be subjected to conflicting obligations. Under California law, the Counties are statutorily required to collect taxes in the amounts established by the Board. However, in the present suit, the Court has enjoined the Counties from collecting those taxes to the extent that they are discriminatory. Thus, if this suit is allowed to proceed without the Board as a party, the Counties will be forced to choose between not collecting the taxes in violation of state law, or collecting the taxes in violation of this Court's orders.

Thus, while plaintiffs argue that they are merely seeking an injunction against the collection of the invalid taxes by the Counties, for the reasons discussed above, the Court finds that the Counties' obligations are inextricably linked to

the assessments by the Board. Therefore, the Court finds that the Board is clearly a necessary party under Rule 19(a).

However, as stated above, the Court lacks subject matter jurisdiction over the Board. Consequently, the Court must now decide if the litigation can proceed in the Board's absence.

2. The Board is an Indispensable Party

Once the Court concludes under Rule 19(a) that an absent party is necessary and that joinder is not feasible, it must then determine whether the action can continue in the absence of the necessary party. Rule 19(b) delineates several factors to be considered and requires that the action be dismissed if it appears in "equity and good conscience" that the absent party is indispensable. Fed. R. Civ. P. 19(b); *see Provident Tradesmen*, 88 S.Ct. 733 (1968) (construing Rule 19(b)).

The Counties argue, based on the factors enumerated in Rule 19(b), that the Board is an indispensable party because (1) a judgment rendered in its absence should be prejudicial to the Board and to the Counties; (2) this prejudice cannot be lessened by the shaping of relief; (3) any judgment rendered in the Board's absence would be inadequate because it would not bind the Board; and (4) plaintiffs have an adequate alternative remedy of filing a 4-R Act suit in state court.

For the reasons discussed in the previous section, the Court agrees with the Counties that the Board is an indispensable party to the present suits. The Court sees no way to satisfactorily eradicate the prejudice to the Board which would invariably result if this litigation were to proceed without the Board as a party. Moreover, as stated above, the Counties would be placed in the untenable position of having to choose between violating either state law or federal law. Because the Court finds that there is no equitable manner in which to resolve these cases without the Board as a party, the Court must dismiss the entire case.

D. Plaintiffs' Motions for Summary Judgment

While all of the remaining plaintiffs have moved for summary judgment, certain of these motions are moot as a result of the Court's finding that the case must be dismissed. Because no final judgments have been issued in either the Southern Pacific case or the Wine Train case, both of those cases will be dismissed for the reasons stated above.[11/]

However, because a final order and a judgment has already been entered by the Court with respect to all of the Santa Fe assessments for tax years 1989 through 1992, the Court shall grant summary judgment for Santa Fe in case No. C-95-3532 DLJ regarding the 1991 Escape Assessment.[12/] In addition, because the stipulated injunction with respect to tax year 1993 became permanent when the Ninth Circuit dismissed the Board's appeal, the Court grants summary judgment for Santa Fe with respect to the 1993 NURPEFAR assessment as well.

III. CONCLUSION

For the foregoing reasons, the Court hereby ORDERS as follows:

(1) Southern Pacific Case No. C-89-3603 DLJ is

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11. The Court notes that were it to rule on the Wine Train plaintiffs' summary judgment motion, that motion would be denied on the grounds that the Wine Train plaintiffs are not entitled to relief for tax years not included in their complaint, nor are they entitled to retroactive relief in the form a refund of taxes which have already been paid.

12. At the hearing, the Board raised a question as to whether the permanent injunction and judgment in Case No. C-894030 DLJ applies to NURPEFAR commuter property for years other than 1992. The Court now clarifies that the injunction and judgment apply to all Santa Fe NURPEFAR property for all tax years between 1989 and 1992.

hereby DISMISSED for lack of jurisdiction;

(2) Wine Train Case No. C-94-1199 DLJ is hereby DISMISSED for lack of jurisdiction;

(3) Summary judgment is hereby GRANTED for Santa Fe in Case No. C-894030 DLJ and Case No. C-95-3532 DLJ.

(4) The prevailing parties in each of these actions shall file proposed judgments consistent with this order within thirty days of the date of this order. Any party may file comments regarding these proposed judgment within two weeks of the filing of the proposed judgments.

IT IS SO ORDERED.
Dated: October 28, 1997.

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D. Lowell Jensen
United States District Judge

APPENDIX B

THE ATCHISON TOPEKA & SANTA FE RAILWAY CO.,	)	No. C-89-4030 DLJ
	)	Master Consolidated
	)	No. C-81-4365 DLJ
Plaintiff	)	
	)	JUDGMENT
STATE BOARD OF EQUALIZATION, et al.,	)	
	)	
Defendants.	)	
	)	

Pursuant to the Court's Order issued on October 28, 1997, the Court hereby enters judgment in favor of plaintiff Atchison Topeka & Santa Fe Railway Co. and against all defendants. It is further adjudged that the preliminary injunction previously entered with respect to the 1993 tax year is now permanent.

IT IS SO ADJUDGED.

Date: February 2, 1998

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D. Lowell Jensen
United States District Judge

THE ATCHISON TOPEKA & SANTA FE RAILWAY CO.,	)	No. C-95-3532 DLJ
	)	Master Consolidated No. C-81-4365 DLJ
Plaintiff	)	
	)	JUDGMENT
5.	)	
STATE BOARD OF EQUALIZATION, et al.,	)	
Defendants.	)	

Pursuant to the Court's Order issued on October 28, 1997, the Court hereby enters judgment in favor of plaintiff Atchison Topeka & Santa Fe Railway Co. and against all defendants. It is further adjudged that the preliminary injunction previously entered with respect to the Notice of Escape Assessment for tax year 1991 is now permanent.

IT IS SO ADJUDGED.

Date: February 2, 1998

D. Lowell Jensen
United States District Judge

THE ATCHISON TOPEKA & SANTA FE RAILWAY CO.,	)	No. C-89-4030 DLJ C-95-3532 DLJ
Plaintiff	)	ORDER
5.	)	
STATE BOARD OF EQUALIZATION, et al.,	)	
Defendants.	)	

On May 13, 1998, the Court heard argument on defendant State Board of Equalization's motion to alter or set aside the judgments entered on February 3, 1998. Paul J. Mooney appeared for plaintiff; Marguerite C. Stricklin appeared on behalf of defendant. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES defendant's motion.

IT IS SO ADJUDGED.

Date: May 14, 1998.

D. Lowell Jensen
United States District Judge

APPENDIX C

OREGON SHORT LINE RAILROAD COMPANY, Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellants.

UNION PACIFIC RAILROAD COMPANY; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellants.

UNION PACIFIC RAILROAD COMPANY; Oregon-Washington Railroad & Navigation Co., Oregon Short Line Railroad Co., Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellants.

UNION PACIFIC RAILROAD COMPANY and its lessors; Oregon-Washington Railroad & Navigation Company, and Oregon Short Line Railroad Company, Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellants.

OREGON SHORT LINE RAILROAD COMPANY; Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON, Defendant-Appellant.

OREGON SHORT LINE RAILROAD COMPANY; Union

Pacific Railroad Company; Oregon-
Washington Railroad & Navigation Co., Plaintiffs-Appellants,
v.
DEPARTMENT OF REVENUE OREGON,
Defendant-Appellee.
OREGON SHORT LINE RAILROAD COMPANY; Union
Pacific Railroad Company; Oregon-
Washington Railroad & Navigation Co., Plaintiffs-Appellants,
v.
DEPARTMENT OF REVENUE OREGON; State of Oregon,
Defendants-Appellees.
UNION PACIFIC RAILROAD COMPANY; Oregon Short
Line Railroad Company; Oregon-
Washington Railroad & Navigation Co., Plaintiffs-Appellants,
v.
DEPARTMENT OF REVENUE OREGON; State of Oregon,
Defendants-Appellees.
OREGON SHORT LINE RAILROAD COMPANY; Union
Pacific Railroad Company; Oregon-
Washington Railroad & Navigation Co., Plaintiffs-Appellants,
v.
DEPARTMENT OF REVENUE OREGON; State of Oregon,
Defendants-Appellees.
OREGON SHORT LINE RAILROAD COMPANY; Union
Pacific Railroad Company; Oregon-
Washington Railroad & Navigation Co., Plaintiffs-Appellants,
v.
DEPARTMENT OF REVENUE OREGON; State of Oregon,
Defendants-Appellees.

Nos. 97-35025, 97-35088, 97-35089, 97-35113, 97-35181 to 97-35186.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 4, 1998
Decided March 23, 1998.

Railroads brought suits against State of Oregon and its Department of Revenue, seeking declaratory and injunctive relief under Railroad Revitalization and Regulatory Reform Act, alleged that State had discriminated against them by overvaluing their rail transportation property and further discriminated in assessing taxes on that property by using 100% of property's true market value, rather than 88% of true market value which was applied to other commercial and industrial property in Oregon. The United States District Court for the District of Oregon, Malcolm F. Marsh, J., found discrimination and ruled that railroads were entitled to interest from State on amounts they had overpaid, but had to pay Oregon's statutory interest rate, rather than the lower federal interest rate, on disputed taxes which had not previously been paid into escrow accounts. State and railroads appealed. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) State did not waive its Eleventh Amendment immunity; (2) Supreme Court's Seminole Tribe decision applied retroactively; (3) Act properly abrogated State's Eleventh Amendment immunity; and (4) railroads were properly assessed Oregon's statutory interest rate.

Affirmed.

[1] FEDERAL COURTS k776
170Bk776
Whether state is immune from suit under Eleventh Amendment is question of law, reviewed de novo. U.S.C.A. Const.Amend. 11.

[2] FEDERAL COURTS k776
170Bk776
Legal issues regarding appropriate interest rate to apply to unpaid taxes are reviewed de novo.

[3] FEDERAL COURTS k265
170Bk265
Under Eleventh Amendment, neither citizens of other states nor state's own citizens can sue it in federal court. U.S.C.A. Const.Amend. 11.

[4] FEDERAL COURTS k265
170Bk265
Congress cannot rely upon Commerce Clause as source of abrogation of Eleventh Amendment because Eleventh Amendment restricts judicial power under Article III, and Article I cannot be used to circumvent constitutional limitations placed upon federal jurisdiction. U.S.C.A. Const. Art. 1, § 8, cls. 2, 3; Art. 3, § 1 et seq.; Amend. 11.

[5] FEDERAL COURTS k266.1
170Bk266.1
State of Oregon did not waive its Eleventh Amendment immunity by participation in Railroad Revitalization and Regulatory Reform Act suit against it until Supreme Court decided Seminole Tribe case, at which time State promptly attacked jurisdiction. U.S.C.A. Const.Amend. 11; 49 U.S.C.A. § 11501.

[6] FEDERAL COURTS k266.1
170Bk266.1
State of Oregon did not waive its Eleventh Amendment immunity against Railroad Revitalization and Regulatory Reform Act suit, by enacting statutes providing for method of repayment of refunds ordered by courts, including any federal court, and providing for method of allocation of tax payments where assessment was being appealed to federal courts; statutes merely facilitated dealing with a process which threatened to go forward whether State liked it or not. U.S.C.A. Const.Amend. 11; 49 U.S.C.A. § 11501; ORS 311.813; Or.Laws 1997, c. 293, § 9.

[7] COURTS k100(1)
106k100(1)
When Supreme Court applies federal law ruling to parties before it, that rule has full retroactive effect to all cases which are not yet final; even if proceedings at district court have been completed, rule applies if case is still pending on direct review.

[8] FEDERAL COURTS k759.1
170Bk759.1
Court of Appeals may affirm on any basis record supports, including one district court did not reach.

[8] FEDERAL COURTS k762
170Bk762
Court of Appeals may affirm on any basis record supports, including one district court did not reach.

[9] CONSTITUTIONAL LAW k229(1)
92k229(1)
Railroad Revitalization and Regulatory Reform Act, authorizing rail carriers to challenge state tax as discriminatory, properly abrogated State's Eleventh Amendment immunity; Congress intended to abrogate States' immunity when it passed the Act, and Act was appropriate legislation to enforce Equal Protection Clause. U.S.C.A. Const.Amends. 11, 14, § 5; 49 U.S.C.A. § 11501(c).

[9] FEDERAL COURTS k265
170Bk265
Railroad Revitalization and Regulatory Reform Act, authorizing rail carriers to challenge state tax as discriminatory, properly abrogated State's Eleventh Amendment immunity; Congress intended to abrogate States' immunity when it passed the Act, and Act was appropriate legislation to enforce Equal Protection Clause. U.S.C.A. Const.Amends. 11, 14, § 5; 49 U.S.C.A. § 11501(c).

[10] INTEREST k31
219k31
Upon conclusion of suit under Railroad Revitalization and Regulatory Reform Act challenging Oregon taxes as discriminatory, railroads were properly assessed Oregon statutory interest rate on amount of overdue taxes that they had neither paid over to State nor deposited in district court ordered escrow account; railroads were able to retain full use of their money while exercising their rights under the Act. 49 U.S.C.A. § 11501(c); ORS 311.500.
***1262** Richard D. Wasserman, Office of the Attorney General, Salem, Oregon, for appellants.

Eugene A. Ritti, Hawley Troxell Ennis & Hawley LLP, Boise, Idaho, for appellees-cross-appellants.

Appeals from the United States District Court for the District of Oregon; Malcolm F. Marsh, District Judge, Presiding. D.C. Nos. CV-91-00954-MA, CV- 93-01013-MA, CV-93-00097-MA, CV-92-00915-MFM, CV-85-02102-MA and CV-92-00915- MA.

Before: FERNANDEZ, RYMER, and TASHIMA, Circuit Judges.

FERNANDEZ, Circuit Judge:

Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad and Navigation Company (collectively "the Railroads"), [FN1] brought a number of actions against the Department of Revenue of the State of Oregon and the State of Oregon (collectively "the State") in which the Railroads sought declaratory and injunctive relief under § 306 of the Railroad Revitalization and Regulatory Reform Act (4-R Act). See 49 U.S.C. § 11501. After years of litigation the State moved the district court to dismiss for lack of subject matter jurisdiction. The State argued that in light of the Supreme Court's

decision in Seminole Tribe v. Florida, 517 U.S. 44, 71-72, 116 S.Ct. 1114, 1131, 134 L.Ed.2d 252 (1996), it was immune under the Eleventh Amendment to the United States Constitution. The district court denied the motion and entered judgment against the State. The Railroads disputed the district court's ruling that they must pay Oregon's statutory interest rate, rather than the lower federal interest rate, on disputed taxes which had not previously been paid into escrow accounts. Both the State and the Railroads appealed. We affirm.

> FN1. Oregon Short Line Railroad Company and Oregon-Washington Railroad and Navigation Company are wholly owned subsidiaries of Union Pacific Railroad Company. They own lines of railroad, which Union Pacific actually operates.

BACKGROUND

The Railroads filed a number of actions against the State in which they alleged that the State had discriminated against them by overvaluing their rail transportation property and further discriminated in assessing the taxes on that property by using 100% of the property's true market value, rather than the 88% of true market value which was applied to other commercial and industrial property in Oregon.

The actions were brought pursuant to § 306 of the 4-R Act. See 49 U.S.C. § 11501. [FN2] These claims were tried before a magistrate judge in September of 1991, and the district court adopted the magistrate judge's findings of fact and conclusions of law and entered a judgment on the claims on September 2, 1992. Another claim regarding the personal property tax had been bifurcated and awaited final resolution at some later time. That claim, therefore, remained open, and the court did not direct the entry of judgment pursuant to Federal Rule of Civil Procedure 54. Meanwhile, litigation related to the Railroads' personal property

claim was wending its way through the courts, and was finally disposed of when we issued our decision regarding the interest rate that had to be paid by the Railroads on tax monies which had been kept in escrow accounts rather than actually turned over to the State. See MHC, Inc. v. Oregon Dep't of Revenue, 66 F.3d 1082 (9th Cir.1995). In MHC, we held that the State could not collect 16% interest on the funds that had been deposited in the escrow account, and that it was limited to the lower federal interest rate on money judgments ***1263** provided by 28 U.S.C. § 1961. See id, at 1090-91.

> FN2. The language of the original § 306, first codified at 49 U.S.C. § 26c (1976 ed.) was slightly revised when the provision was recodified in 1978 (49 U.S.C. § 11503) and then again in 1995 (49 U.S.C. § 11501). The revisions were not intended to make a substantive change in the law. See Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 457 n. 1, 107 S.Ct. 1855, 1858 n. 1, 95 L.Ed.2d 404 (1987) (1978 revision " 'may not be construed as making a substantive change in the laws replaced' "); H.R. Conf. Rep. No. 104-422, at 878 (1995) ("This provision (11301) replaces without substantive change former section 11503."). For convenience, further citations to the statute refer to the text of its current version in 49 U.S.C. § 11501, and all references to § 11501 are to 49 U.S.C. § 11501.

On April 8, 1996, after the MHC ruling came down, the district court held a conference with the parties regarding this litigation. Because the Railroads had paid the 16% statutory interest rate when the escrow accounts were disbursed, the State owed them a refund. The Railroads informed the court that they were dismissing all of the claims still at issue. Both parties also reported an agreement on the procedure to be used in performing interest calculations in compliance with MHC. The district court set a "final paper call" for June 14, 1996.

However, events were then outstripping this litigation because on March 27, 1996, the Supreme Court had decided Seminole Tribe. Based upon that decision, the State filed its motion to dismiss this action on April 22, 1996, because, it argued, it had Eleventh Amendment immunity from suit under the 4-R Act and the court had "no jurisdiction to hear further proceedings.". [FN3] The district court denied the motion because, it declared, the State had waived its immunity and Seminole Tribe should not apply retroactively to this case.

> FN3. At oral argument the State confirmed that it was asserting its immunity only in order to preclude proceedings after March 27, 1996, and was not seeking to attack earlier decisions, orders or settlements.

The reserved personal property issues, however, still remained unresolved. They were finally decided when the district court ruled that the Railroads were entitled to interest from the State on amounts that they had overpaid, but that the Railroads were not entitled to relief from Oregon's 16% interest rate on taxes that they had not paid or escrowed at all. A final judgment was entered on December 3, 1996, and this appeal followed.

JURISDICTION AND STANDARD OF REVIEW

Unless the Eleventh Amendment precludes it, the district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 49 U.S.C. § 11501(c). We have jurisdiction pursuant to 28 U.S.C. § 1291.

[1][2] "Whether a state is immune from suit under the Eleventh Amendment is a question of law and is reviewed de novo." Micomonaco v. Washington, 45 F.3d 316, 319 (9th Cir.1995). Similarly, we will review the legal issues regarding the appropriate interest rate to apply to unpaid taxes de novo. Cf. MHC, 66 F.3d at 1090-91 (clearly deciding a similar interest rate issue as a matter of law without expressly saying so).

DISCUSSION

In § 11501(b), Congress declared that certain actions "unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them...." It then went on to provide that "[n]otwithstanding section 1341 of title 28 [the Anti-injunction Act] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section." 49 U.S.C. § 11501(c). There is no dispute that Congress truly intended to confer jurisdiction upon the district courts in actions against states for the purpose of precluding the discrimination which Congress had found. Cf. ACF Indus., Inc. v. Department of Revenue, 961 F.2d 813, 816 (9th Cir.1992), rev'd on other grounds, 510 U.S. 332, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). The major issue before us is whether, in light of Seminole Tribe, Congress could constitutionally do so. If it could, we can go on to decide the subsidiary interest rate issue raised by the Railroads.

A. The Constitutionality of § 11501(c)

[3][4] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Of course, that means that neither citizens of other states nor a state's own citizens can sue it in federal court. See Idaho v. Coeur ***1264** d'Alene Tribe, --- U.S. ----, ----, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438 (1997). Thus we give states the "dignity and respect" to which they are entitled. Id. But there are exceptions to that immunity. As we have said, "Congress can abrogate the Eleventh Amendment without the consent of the states in certain instances or a state may waive its

immunity by consenting to suit in federal court." Micomonaco, 45 F.3d at 319. We all now know that Congress cannot rely upon the Commerce Clause as a source of abrogation of the Eleventh Amendment because "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Seminole Tribe, 517 U.S. at 71-74, 116 S.Ct. at 1131-32. We have known that since March 27, 1996, when Seminole Tribe was decided.

The Railroads first challenge the State's claim that the district court had no jurisdiction by pointing to the waiver exception, and then go on to argue that Seminole Tribe should not be applied to this case at all. We must first decide whether these non-constitutional grounds uphold the district court's decision and will only turn to the constitutional challenge, if these grounds fail. See Jean v. Nelson, 472 U.S. 846, 854, 105 S.Ct. 2992, 2997, 86 L.Ed.2d 664 (1985); Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1474 (9th Cir.1994). As we will demonstrate, the non-constitutional grounds cannot do tasks that the Railroads have assigned to them.

(1) Waiver

[5] The Railroads assert that the State waived its Eleventh Amendment immunity for all purposes because it actively participated in this litigation up to the time that Seminole Tribe was decided. While we will say a bit more about our reasoning, we essentially disposed of this claim when we held that:

> The State's failure to raise an immunity defense before the district court, at a time where it was clearly foreclosed by Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) [the case overruled by Seminole Tribe], is far from an express or implied waiver. Given the lack of any other evidence establishing waiver, review by a federal court is foreclosed.

Quillin v. Oregon, 127 F.3d 1136, 1139 (9th Cir.1997); see also Mueller v. Thompson, 133 F.3d 1063, 1064-66 (7th Cir.1998). Here, as in Quillin, the State acceded to the district court's jurisdiction and vigorously participated in this action until Seminole Tribe was decided. Here, as in Quillin, it cannot be said that the State's mere participation was the result of an express or implied waiver. Were we to hold otherwise, we would not be giving proper respect to the requirement that states cannot easily waive their immunity. See Gamboa v. Rubin, 80 F.3d 1338, 1350 (9th Cir.), vacated on other grounds, 101 F.3d 90 (9th Cir.1996) (en banc).

But, argue the Railroads, the State entered into stipulations which formed the bases for consent orders, and that must amount to a waiver. We think not. The Railroads' authority for that proposition rests heavily on two cases. See Mitchell v. Commission on Adult Entertainment Establishments, 12 F.3d 406, 408-09 (3d Cir.1993); Garrity v. Sununu, 752 F.2d 727, 737-38 (1st Cir.1984). In Mitchell, there was no impediment to asserting immunity, but the state did not appeal the denial of immunity directly. It only sought to raise immunity in a collateral attack on the judgment. See 12 F.3d at 409. Similarly, in Garrity, the state never did object directly to the underlying jurisdiction of the district court, but actually acquiesced and then mounted a collateral attack on a fee award. See 752 F.2d at 737-38. Even if we were to otherwise embrace the holding of those cases, they would be inapposite. Here the State could not raise the issue until Seminole Tribe was decided, and promptly attacked jurisdiction once that decision was handed down.

[6] In a final attempt to use waiver to parry the State's allonge, the Railroads point to the fact that Oregon enacted statutes for the purpose of implementing what then appeared to be a possible conclusion of the litigation process. Oregon provided for the method of repayment of refunds ordered by the courts, including any federal court. See Or.Rev.Stat. § 311.813. It also provided

for the method of allocation of tax payments ***1265** where an assessment was being appealed to the federal courts. See 1995 Or. Laws, chapter 293, § 9. But those statutes merely facilitated dealing with a process which threatened to go forward whether the State liked it or not. They are far from stating a waiver in "the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240, 105 S.Ct. 3142, 3146, 87 L.Ed.2d 171 (1985); see also Clallam County v. Department of Transp., 849 F.2d 424, 426-27 (9th Cir.1988). In fact, the statutes are, again, nothing more than a recognition that the litigation could and would proceed whether the State liked it or no.

Thus, we return to the place where we started, Quillin, 127 F.3d at 1139, and find the State's various actions to be "far from an express or implied waiver." Because prior to Seminole Tribe the State was forced to participate in these proceedings, we would expect it to have done so in good faith and with vigor. It was not forced into the Hobson's choice of either refusing to fully participate in the litigation or waiving its immunity for all future proceedings when it participated in this litigation. [FN4]

> FN4. As we noted previously, the State's attack is limited to post- Seminole Tribe proceedings.

(2) Retroactivity

[7] The Railroads essentially argue that Seminole Tribe does not apply to this case because when that case was decided most of the issues in this case had already been determined. We are satisfied that the "most of the issues" argument is not supportable. The rule is that when the Supreme Court applies a federal law ruling to the parties before it, that rule has full retroactive effect to all cases which are not yet final. See Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74

(1993); United States v. Real Property Located At 20832 Big Rock Drive, 51 F.3d 1402, 1406 (9th Cir.1995). Even if proceedings at the district court have been completed, the rule applies if the case is still pending on direct review. Id. That does not mean that retroactivity ceases to apply when the case is almost final or close to being final. It means that it ceases to apply when the case is final.

Here it is pellucid that the case was not final when Seminole Tribe was decided. The litigation had not ended. Indeed, the district court's ultimate determination on December 3, 1996, was properly labeled as the final judgment. See National Distrib. Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir.1997); United States v. One 1986 Ford Pickup, 56 F.3d 1181, 1184- 85 (9th Cir.1995).

(3) The Fourteenth Amendment

[8] Because neither waiver nor retroactivity principles will support the district court's determination that it did have jurisdiction, we must turn to the constitutionality issue. The district court did not reach that issue, but we may affirm "on any basis the record supports, including one the district court did not reach." Herring v. FDIC, 82 F.3d 282, 284 (9th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 581, 136 L.Ed.2d 512 (1996).

Again, Seminole Tribe made it clear that § 11501(c) cannot be upheld pursuant to Congress' authority under the Commerce Clause--U.S. Const. art. I, § 8, cl. 2. See 517 U.S. at 71-74, 116 S.Ct. at 1131-32. That does not end the discussion because "through the Fourteenth Amendment, federal power [was] extended to intrude upon the province of the Eleventh Amendment and therefore ... § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." Id. at 59, 116 S.Ct. at 1125. As the Supreme Court has pointed out, if Congress "has unequivocally

expresse[d] its intent to abrogate the immunity" and if "Congress has acted pursuant to a valid exercise of power," the State's immunity has been effectively abrogated. Id. at 55, 116 S.Ct. at 1123 (internal quotations omitted).

[9] In this case, no one doubts that Congress did intend to abrogate the State's immunity when it enacted § 11501(c). But could it do so? We must answer that question without reference to what Congress did or did not say about the source of its power. We are not called upon to decide whether ***1266** Congress pointed to the right part of the Constitution when it passed this legislation. See Mills v. Maine, 118 F.3d 37, 43 (1st Cir.1997). Rather,

> It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection" for [t]he ... constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.

EEOC v. Wyoming, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 1064 n. 18, 75 L.Ed.2d 18 (1983) (citations and internal quotations omitted). For that reason, it matters not that we have previously upheld the statute under the Commerce Clause. See Arizona v. Atchison, Topeka & Santa Fe R.R. Co., 656 F.2d 398, 406-10 (9th Cir.1981). Even though the Commerce Clause can no longer be relied upon, if the Fourteenth Amendment will support the section, that will be quite sufficient. See Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655-56, 101 S.Ct. 2070, 2076, 68 L.Ed.2d 514 (1981) (an allegedly discriminatory state tax can be challenged under the Commerce Clause, the Privileges and Immunities Clause of art. IV, § 2, and the Equal Protection Clause). Thus, we need only ask whether the statute is appropriate legislation to enforce the

Equal Protection Clause.

We have held that:

> a statute is appropriate legislation to enforce the Equal Protection Clause if the statute may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is plainly adapted to that end and [if] it is not prohibited by but is consistent with the letter and spirit of the constitution.

Clark v. California, 123 F.3d 1267, 1270 (9th Cir.1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686) (internal quotations omitted); see also Katzenbach v. Morgan, 384 U.S. 641, 650, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828 (1966). In that regard, we have stated that "Congress's power to pass legislation under the Fourteenth Amendment is very broad." Clark, 123 F.3d at 1270. That is because "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach, 384 U.S. at 651, 86 S.Ct. at 1723-24. Interestingly enough, that means that Congress can even "create broader equal protection rights than the Constitution itself mandates." Clark, 123 F.3d at 1270. That does not mean that Congress can go so far as to redefine the very substance of the Constitution itself under the guise of enforcing equal protection concepts. See City of Boerne v. Flores, --- U.S. ----, ----, 117 S.Ct. 2157, 2164, 138 L.Ed.2d 624 (1997). It does mean, however, that Congress can enact legislation which "prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." Id. at ----, 117 S.Ct. at 2163 (internal quotations omitted); see also City of Rome v. United States, 446 U.S. 156, 176, 100 S.Ct. 1548, 1561, 64 L.Ed.2d 119 (1980).

While the area of taxation might not immediately leap to mind when one thinks of equal protection problems, there can be little doubt that discriminatory state taxation can implicate equal

protection concerns. States do have broad authority to classify those whom they intend to tax and to impose different tax burdens on different classes. See Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344, 109 S.Ct. 633, 638, 102 L.Ed.2d 688 (1989); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 368, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940); Southern Ry. Co. v. Greene, 216 U.S. 400, 417, 30 S.Ct. 287, 291, 54 L.Ed. 536 (1910). Nevertheless, the Supreme Court has not hesitated to strike down taxation schemes which do not rest "upon some reasonable consideration of difference or policy...." Allegheny Pittsburgh, 488 U.S. at 344, 109 S.Ct. at 638; see also Southern Ry., 216 U.S. at 417- 18, 30 S.Ct. at 291; cf. Atchison, Topeka, & Santa Fe Ry. Co. v. Vosburg, 238 U.S. 56, 61-62, 35 S.Ct. 675, 676-77, 59 L.Ed. 1199 (1915); Gulf, C. & S.F. Ry. Co. v. Ellis, 165 U.S. 150, 165-66, 17 S.Ct. 255, 261, 41 L.Ed. 666 (1897).

***1267** It is just that type of unreasonable classification and discrimination that § 11501 was designed to correct. The statute itself refers to the unreasonable burdens and discrimination which it intends to eliminate. See § 11501(b). Moreover, as the Supreme Court said in Department of Revenue v. ACF Indus., Inc., 510 U.S. 332, 336, 114 S.Ct. 843, 846, 127 L.Ed.2d 165 (1994):

> When drafting the legislation, Congress was aware that the railroads are easy prey for State and local tax assessors in that they are non-voting, often non- resident, targets for local taxation, who cannot easily remove themselves from the locality. Section 306 of the 4-R Act, ... addresses this concern by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads.

(internal quotations and citations omitted); see also Burlington Northern, 481 U.S. at 457, 107 S.Ct. at 1858 ("After an extended period of congressional investigation, Congress concluded that 'railroads are over-taxed by at least $50 million each year.' " (citation omitted)). In the face of all of that, it would take an

unusual amount of pertinacity to cling to the notion that Congress could not enact § 11501 pursuant to its power under the Fourteenth Amendment. [FN5] Surely, the statute may be regarded as an enactment to enforce the equal protection clause, is consistent with the Constitution, is adapted to its ends, and does not provide remedies which are disproportionate to the desired goal of eliminating discrimination. See City of Boerne, --- U.S. at ----, 117 S.Ct. at 2164. The proportionality of the remedy is underscored by Congress' decision to leave some play in the joints by withholding relief when the disparity of treatment is less than 5%. See § 11501(c).

> FN5. The State, by the way, has not appealed the determination that it did discriminate against the Railroads in just the ways proscribed by Congress.

In fact, the specific actions precluded by § 11501(b) include the assessment of rail transportation property at a higher ratio to true market value than that used for other commercial and industrial property, and imposing a tax that discriminates against rail carriers. At the fringes, some classifications prohibited by § 11501 might have been sustainable against an equal protection challenge in the Supreme Court. See Browning, 310 U.S. at 368-70, 60 S.Ct. at 972 (holding that when a state's method of taxation of railroads and other utilities was historical and not invidious there was no equal protection violation). But, given the problems it saw, Congress could eliminate all railroad specific discrimination, even if it eliminated more practices than the Supreme Court itself would have done. See Clark, 123 F.3d at 1270. Therefore, § 11501 is a constitutionally sound enactment, which abrogated the State's Eleventh Amendment immunity, because Congress could draw its authority from § 5 of the Fourteenth Amendment.

B. Interest Rate

[10] The Railroads complain that, pursuant to Oregon Revised Statutes Section 311.500, they are being charged interest at the rate of about 16% per annum (1 1/3 percent per month) on the amount of overdue taxes that they had neither paid over to the State nor deposited in a district court ordered escrow account. They support their argument against that interest rate by relying on our decision in MHC, 66 F.3d at 1090, in which we declared that where the deposited taxes had been paid into a court registry or escrow account as a condition of interim equitable relief under § 11501 of the 4-R Act, it would be improper to allow the State to then collect at the 16% interest rate. We explained:

> Were the state to prevail, the railroads would have been both deprived of the use of their funds for a significant period of time and subjected to a substantial economic penalty for placing their funds in escrow pursuant to a court order. Under such a regime, railroads would be strongly discouraged from availing themselves of the remedy afforded by the 4-R Act.

Id. In the case at hand, however, there was no such problem because the Railroads did not pay the disputed amounts into the court registry or into an escrow account. They kept those amounts and used them for their own purposes. They were not at all restrained from exercising their rights under ***1268** the 4-R Act. Rather, they did exercise them and enjoyed the full use of their funds at the same time.

Were that all, this distinction would be an end to the Railroads' claim. It is not all because in a dictum in MHC we also reflected upon the fact that one of the purposes of § 11501(c) is to allow railroads to put off payment of their taxes, while one of the purposes of the 16% interest rate is to encourage railroads to pay up right away. Thus, § 11501(c) and the interest rates can pull in different directions. We said, "[t]his conflict alone would seem to be sufficient to bar assessment of punitive interest [16% per annum]. However, we need not go that far in this case." Id. at

1089 (citation omitted). The Railroads faced no such conundrum in this case. They were not required to pay over the tax because Oregon did not insist that they do so. See Or.Rev.Stat. § 308.020. Thus, no rights of the Railroads were restrained. They could have paid the disputed amounts into a special county account, had they wanted to do so. See Or.Rev.Stat. § 311.160(3). And if they felt that the choices the State gave them were connected to or helped to foster a form of discrimination, § 11501 itself was available. The Railroads' decision to simply hold on to their money rather than choose another expedient was just that--their choice. We see no reason to allow the Railroads to retain the full use of their money while avoiding the 16% interest rate. We, therefore, affirm the district court's denial of relief from that rate.

CONCLUSION

After more than a decade of litigation over its taxation of the Railroads, the State believed that the Supreme Court had given it a handsel when Seminole Tribe was decided. If § 11501 of the 4-R Act depended on the Commerce Clause for its validity, the State would have been right. As it is, Seminole Tribe cannot deliver the State from its woe because the constitutional validity of § 11501 rests on the Equal Protection Clause of the Fourteenth Amendment. Thus, Congress properly abrogated the State's Eleventh Amendment immunity, and the district court had jurisdiction over these cases.

AFFIRMED.

END OF DOCUMENT

APPENDIX D

CONSTITUTION OF THE STATE OF CALIFORNIA
1879
ARTICLE XIII. TAXATION

§ 19. Pipelines, flumes, and other waterways within two or more counties; railroad and utilities properties; periodic assessment; restrictions or changes; delegation of duties

Sec. 19. The Board shall annually assess (1) pipelines, flumes, canals, ditches, and aqueducts lying within 2 or more counties and (2) property, except franchises, owned or used by regulated railway, telegraph, or telephone companies, car companies operating on railways in the State, and companies transmitting or selling gas or electricity. This property shall be subject to taxation to the same extent and in the same manner as other property.

No other tax or license charge may be imposed on these companies which differs from that imposed on mercantile, manufacturing, and other business corporations. This restriction does not release a utility company from payments agreed on or required by law for a special privilege or franchise granted by a government body.

The Legislature may authorize Board assessment of property owned or used by other public utilities.

The Board may delegate to a local assessor the duty to assess a property used but not owned by a state assessee on which the taxes are to be paid by a local assessee.

REVENUE AND TAXATION CODE
DIVISION 1. PROPERTY TAXATION

§ 721. Pipelines, flumes, etc.; railroads and utilities; annual assessment and valuation

The board shall annually value and assess all of the taxable property within the state that is to be assessed by it pursuant to Section 19 of Article XIII of the Constitution and any legislative authorization thereunder.

§ 722. State-assessed property; assessment formula; preparation of roll

State-assessed property shall be assessed at its fair market value or full value as of 12:01 a.m. on the first day of January. The board shall annually prepare an assessment roll of the assessments made by it for transmittal to county auditors and city auditors as hereinafter provided in this chapter.

§ 731. Unitary property valuation; notice of assessed value; declaration of intent to petition and petition for reassessment

Each year between the first day of January and the first day of June, upon valuing the unitary property of an assessee, the board shall mail to the assessee, at its address as shown in the records of the board, a notice stating the amount of the assessed value of the assessee's unitary property. The notice shall advise the assessee of the date by which and the place where a declaration of intent to petition for reassessment, and the date by which and place where a petition for reassessment of the unitary property may be filed. The date for filing of the declaration of intent shall not be less than 20 days from the date of the mailing of the notice of value and the date for filing the petition shall not be less than 30 days from the date set for filing the declaration of intent to petition.

§ 732. Nonunitary property valuation; notice of assessed value; declaration of intent to petition and petition for reassessment

Each year between the first day of January and the last day of June, upon valuing the nonunitary property of an assessee, the board shall mail to the assessee at its address shown in the records of the board a notice stating the amount of the assessed value of the assessee's nonunitary property. The notice shall advise the assessee of the date by which and the place where a declaration of intent to petition for reassessment, and the date by which and place where a petition for reassessment of the nonunitary property may be filed. The date for filing of the declaration of intent shall not be less than 20 days from the date of the mailing of the notice of value and the date for filing the petition shall not be less than 30 days from the date set for filing of the declaration of intent to petition.

§ 733. Failure to file declaration of intent or failure to file petition for reassessment; finality of assessment; extension upon written request

If the assessee fails to file a declaration of intent to file a petition for reassessment within the period specified in the notice mailed by the board in accordance with Section 731 or Section 732, an assessment of unitary or nonunitary property of the assessee shall become final at the expiration of the period specified. If the assessee files a petition for reassessment within the period specified for filing a declaration of intent to petition, no declaration of intent need be filed.

If, after a declaration of intent to file a petition has been timely filed, a timely petition for reassessment is not filed with the board, an assessment of unitary or nonunitary property of an assessee shall become final at the expiration of the period specified for filing a petition in the notice given in accordance

with Section 731 or Section 732.

The board may extend the period for filing a petition for reassessment once for a period not to exceed 15 days, provided a written request for the extension is filed with the board prior to the expiration of the period for which the extension may be granted.

§ 741. Petition for reassessment; grounds; delivery

A petition for reassessment of unitary or nonunitary property shall be in writing and shall state the specific grounds upon which it is claimed a correction or adjustment of the assessment is founded. The petition shall be delivered to the board at its headquarters office in Sacramento.

§ 742. Time and place of hearings; reassessment petitions; notice

Upon receipt of a timely petition for reassessment, the board shall set a time and place within the state for hearing on the petition. Notice thereof shall be mailed to the assessee at its address as shown in the records of the board, not less than 10 working days in advance of the date of the hearing.

§ 743. Hearings; continuation; open to public; record; transcript

The hearing may be continued by the board for good cause. The hearing shall be open to the public, except that upon conclusion of the taking of evidence the board may deliberate in private with the aid of its staff in reaching a conclusion. Upon written request, the board shall make a full record of the hearing and furnish the

petitioner with a transcript thereof at the petitioner's expense.

§ 744. Notice of decision on petition for reassessment; findings and conclusion; time for completion of decisions; correct value

(a) The board shall notify the petitioner of its decision on a petition for reassessment by mail and shall make written findings and conclusions if requested at or prior to the commencement of the hearing. The board shall send a periodic report of its decisions and any written findings and conclusions thereon to each county in which affected state-assessed property is situated. The findings shall fairly disclose the board's determination of material factual issues and shall contain a statement of the method or methods of valuation used by the board in valuing the property. Notwithstanding the requirement for a statement of method or methods, the board's approval of a settlement of a lawsuit contesting the value of state-assessed property shall be sufficient disclosure when value is determined in accordance with a board-approved settlement. Decisions of the board on petitions for reassessment of state-assessed property shall be completed on or before December 31.

(b) When the value of an assessee's state-assessed property is determined, after a hearing on a petition for reassessment, to be different from the value originally adopted by the board, the board shall determine the year in which the corrected value is to be entered on the roll. The correct value may be entered on the roll for the fiscal year in which the determination is made, or the difference between the original and the corrected value may be entered as an increase or decrease in the assessment for the succeeding fiscal year. If the corrected value is entered on the roll for the fiscal year in which it is determined, and the board roll has been transmitted to the county auditors, the board shall make the corresponding changes in allocations and transmit the roll corrections to the county auditor.

(c) If the amount of the correction is to be entered on the roll for the succeeding fiscal year, an amount is to be added in lieu of interest. If the correction results in a reduction in assessed value, there shall be added to the reduction, in lieu of interest, 9 percent of the difference between the original assessed value and the reduced assessed value. If the correction results in an increase in assessed value, there shall be added to the increase, in lieu of interest, 9 percent of the difference between the original assessed value and the increased assessed value.

§ 755. Estimate of total unitary and operation nonunitary value of state- assessed property; counties and revenue districts; transmission to county auditors, inspection

(a) On or before July 15, the board shall transmit to each county auditor an estimate of the total unitary value and operating nonunitary value of state- assessed property in the county and of nonunitary state-assessed property in each revenue district in the county. An estimate need not be made for a revenue district that did not levy a tax or assessment during the preceding year unless the board receives on or before January 1 preceding the fiscal year for which the levy is to be made a notice in writing of the proposed levy. The estimate shall be regarded as establishing the total assessed value of state- assessed property in the county and each revenue district in the county for the purpose of determining tax rates, subject only to such changes as may be transmitted on or prior to July 31. All information furnished pursuant to this section is at all times during office hours open to inspection of any interested person or entity.

(b) Notwithstanding subdivision (a), in making the estimate referred to in subdivision (a), the unitary value and nonunitary value of the property of regulated railway companies and property subject to subdivision (i) of Section 98.9 shall be allocated by revenue district.

§ 756. Transmission of roll to county auditors; contents; estimate of total assessed value of state-assessed property; statement of roll change

(a) On or before July 31, the board shall transmit to each county auditor a roll showing the unitary and operating nonunitary assessments made by the board in the county and the nonoperating nonunitary assessments made by the board in each city and revenue district in the county; provided, however, that the roll need not show the assessments made by the board in a revenue district which did not levy a tax or assessment during the preceding year. Such roll is at all times, during office hours, open to the inspection of any person representing any taxing agency or revenue district, or any district described in Section 2131. If the roll does not show the assessments in a revenue district as herein provided and a notice of a proposed levy is furnished the board in writing, on or before January 1 preceding the fiscal year for which the levy is to be made, the board shall furnish an estimate of the total assessed value of nonoperating nonunitary state-assessed property in the district and shall transmit thereafter to the county auditor a statement of roll change showing the nonoperating nonunitary assessments made by the board in the district.

(b) Notwithstanding subdivision (a), in making the roll referred to in subdivision (a), the unitary value and nonunitary value of the property of regulated railway companies and property subject to subdivision (i) of Section 98.9 shall be enrolled by revenue district.

§ 2601. Secured roll; delivery to collector; auditor's affidavit; machine-prepared roll or roll retained in electronic data-processing equipment; procedure

(a) On or before the fourth Monday in September, the auditor shall deliver the secured roll to the tax collector, with an affixed affidavit, subscribed by him, as follows:

"I, _____, Auditor of _____ County, swear that I received the assessment roll from the assessor, with his affixed affidavit; that I have corrected it as required by the State Board of Equalization; and that I have reckoned the respective sums due as taxes and have added the columns of valuations and taxes, as required by law."

If the roll is a machine-prepared roll, the auditor shall deliver the assessment roll to the assessor and shall deliver the roll on which he has extended taxes to the tax collector, with an affixed affidavit, subscribed by him, as follows:

"I, _____, Auditor of _____ County, swear that the attached roll is a reproduction of the roll prepared by the assessor and corrected by the State Board of Equalization; and that I have reckoned the respective sums due as taxes and have added the columns of valuations and taxes as required by law."

(b) If the roll is a machine-prepared roll, and the tax bills are, with the consent of the tax collector and the approval of the board of supervisors, also machine-prepared by the auditor, the auditor shall, on or before the fourth Monday in September, deliver the assessment roll to the assessor, and shall, on or before October 16, deliver the roll on which he has extended taxes to the tax collector, with an affixed affidavit, subscribed by him, as follows:

"I, _____, Auditor of _____ County, swear that the attached roll is a reproduction of the roll prepared by the assessor and corrected by the State Board of Equalization; and that I have reckoned the respective sums due as taxes and have added the columns of valuations and taxes as required by law."

(c) If the extended roll is retained in electronic data-processing equipment and no physical document is prepared and if the tax bills are, with the consent of the tax collector and the approval of the board of supervisors, machine prepared, the auditor shall, on

or before the fourth Monday in September, deliver the assessment roll to the assessor, and shall, on or before October 16, deliver the completed tax bills to the tax collector with an affidavit, subscribed by him, as follows:

"I, _____, Auditor of _____ County, swear that the tax bills herewith submitted to you are the result of extending the roll prepared by the assessor and corrected by the State Board of Equalization and that I have determined the respective sums due as taxes, in the total amount of $_____, as required by law."

§ 2602. Collector's duty

The tax collector shall collect all property taxes.

§ 2603. Taxes charged to collector

At the time the auditor delivers the local assessment roll to the tax collector, he shall charge the collector with the taxes extended thereon, together with the taxes extended on the board roll.

§ 5148. Action against board and county based on evaluation, assessment ratio, or allocation of value of state-assessed property; procedure; grounds for maintenance of action

Notwithstanding Section 5140, an action to recover taxes levied on state-assessed property arising out of a dispute as to an assessment made pursuant to Section 721, including a dispute as to valuation, assessment ratio, or allocation of value for assessment purposes, shall be brought under this section. In any action brought under this section, the following requirements shall apply:

(a) The action shall be brought by the state assessee. There shall be a single complaint with all parties joined therein with respect to disputes for any year.

(b) The action shall name the board and the county or counties. When a county is named which collected taxes on behalf of a city or cities, the county shall give notice of that action to the city or cities within 30 days of receipt of advice from the board of the action. A fee shall be payable by the state assessee in an amount prescribed by the court to cover the reasonable costs incurred by a county or counties in giving that notice. Any city receiving notice of the action filed against the board and the county may, within 30 days of the receipt of that notice, intervene in that action. Whether or not a city intervenes in the action, any judgment rendered for an assessee shall be entered exclusively against the county; however, the county shall be entitled to recover separately from the city or cities and other tax entities those taxes collected by the county on behalf of the city or cities and other tax entities which are subject to refund to the assessee as the result of the judgment. Payment to the taxpayer upon the judgment and any interest thereon may be deferred by the county until the apportionment of property tax revenue next following the date of the judgment, or as the county and the taxpayer may otherwise agree. Interest shall accrue during any deferral period unless the county and taxpayer otherwise agree. The county may if it chooses to do so offset the amount of the judgment and interest recoverable by it from the city or cities and other tax entities against amounts held in the county treasury therefor or against amounts due and payable thereto, including, but not limited to, property tax apportionments. The amount of the fee required by this section shall not be recoverable by the assessee in the action and no judgment entered in the action in favor of the assessee shall provide for the recovery of the fee.

As used in this section, "county" includes a city and county.

(c) Service of the summons and complaint shall be only upon the board. The board shall serve as agent of the defendant county or counties for the purpose of service of process. A fee shall be payable by the state assessee in an amount prescribed by the court

to cover all reasonable costs incurred by the board while acting in its capacity as agent for the defendant counties.

(d) Venue of the action shall be in any county in which the Attorney General of California has an office or in which the state assessee has a significant presence.

(e) The action shall be limited in the case of valuation and allocation disputes to the grounds specified in the following:

(1) A petition for reassessment filed under Section 741, or any proceeding thereon.

(2) A petition for correction of allocated assessment filed under Section 747, or any proceeding thereon.

(f) A timely filed petition for reassessment or petition for correction of allocated assessment shall constitute a claim for refund if the petitioner states in the petition it is intended to so serve.

(g) The action shall be commenced only after payment of the taxes in issue and within four years after the latest of the dates that the State Board of Equalization mailed its decision or its written findings and conclusions on the following:

(1) A petition for reassessment filed under Section 741 and intended to constitute a claim for refund.

(2) A petition for correction of allocated assessment filed under Section 747 and intended to constitute a claim for refund.

(h) The action shall not be joined with any action filed under Section 5140.

(i) Any refund of tax overpayments and any interest thereon,

determined in any action brought under this section to be due shall be made by the defendant county or counties.

§ 5170. Assessment refund actions; judicial review

In suits for the refund of state-assessed property taxes, the trial court shall not be restricted to the administrative record, but shall consider all evidence relating to the valuation of the property admissible under the rules of evidence. The court shall base its decision upon the preponderance of the evidence before it.

Supreme Court, U.S.
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No. 98-1448

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Petitioner,
v.
THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals properly conclude that Section 306 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") is "appropriate" legislation to enforce the Fourteenth Amendment's guarantee of equal protection of the law and therefore validly abrogates state sovereign immunity from suit in federal court?

PARTIES TO THE PROCEEDING BELOW

Petitioner is the State Board of Equalization of the State of California, a defendant to the proceedings below.

Plaintiff below was The Atchison, Topeka & Santa Fe Railway Company, a former Delaware corporation with its principal place of business in Topeka, Kansas. On December 31, 1996, The Atchison, Topeka & Santa Fe Railway Company was merged with and into Burlington Northern Railroad Company, with the surviving corporation later renamed The Burlington Northern and Santa Fe Railway Company. The Burlington Northern and Santa Fe Railway Company is thus respondent in this Court. For purposes of this brief, respondent will be referred to as Santa Fe, consistent with the terminology used in the opinions below.

The California counties of Alameda, Contra Costa, Fresno, Kern, Kings, Los Angeles, Madera, Merced, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Joaquin, and Tulare, all defendants in the action below, are formally respondents here.

RULE 29.6 STATEMENT

The Burlington Northern and Santa Fe Railway Company, the corporate successor to The Atchison, Topeka & Santa Fe Railway Company, is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, a Delaware Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. THE DISTRICT COURT'S JUDGMENT, WHICH WAS SUMMARILY AFFIRMED BY THE COURT OF APPEALS, RESTS ENTIRELY ON GROUNDS INDEPENDENT FROM THE QUESTION PRESENTED HERE	8
II. GRANTING THE RELIEF SOUGHT BY PETITIONER WOULD NOT END THIS LITIGATION	10
III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF SECTION 306	12
IV. TO THE EXTENT THE COURT OF APPEALS' DECISION IS BASED UPON THE CONCLUSION THAT SECTION 306 VALIDLY ABROGATED STATE SOVEREIGN IMMUNITY, IT IS CORRECT	14
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Allegheny-Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989) 12, 20
Atchison, Topeka & Santa Fe Ry. v. California State Bd. of Equalization, 102 F.3d 425 (9th Cir. 1996) 4, 9, 10
Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257 (1978) 10
Burlington Northern R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987) 20
CSX Transp., Inc. v. Board of Pub. Works W. Va., 138 F.3d 537 (4th Cir.), *cert. denied*, 119 S. Ct. 63 (1998) 7, 11, 12
City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157 (1997) ..... *passim*
EEOC v. Wyoming, 460 U.S. 226 (1983) 19
Employment Div., Dep't of Human Resources Oregon v. Smith, 494 U.S. 872 (1990) 15
Ex parte Virginia, 100 U.S. 339 (1879) 15
Ex parte Young, 209 U.S. 123 (1908) 6, 11, 12
Green v. Mansour, 474 U.S. 64 (1985) 11
Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) 8
Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) 8, 9
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 16
Katzenbach v. Morgan, 384 U.S. 641 (1966) ..... *passim*
Nashville Chatanooga & St. Louis Ry. v. Browning, 310 U.S. 362 (1940) 21
Oregon Short Line R.R. v. Department of Revenue Oregon, 139 F.3d 1259 (9th Cir. 1998) ..... *passim*
Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 8
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) ..... *passim*
United States v. Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002 (1981) 19

TABLE OF AUTHORITIES—Continued

Page

Wheeling & Lake Erie Ry. v. Public Util. Comm'n of Pa., 141 F.3d 88 (3d Cir. 1998) 12, 13, 18
Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) .. 19

CONSTITUTION(S)

U.S. Const. amend XIV, § 5 ..... *passim*
U.S. Const. art. I, § 8, cl. 18 15

STATUTES

Pub. L. No. 94-210, § 306(2), 90 Stat. 31, 54 (1976) 20
Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501 (Supp. I 1995) ..... *passim*

LEGISLATIVE MATERIALS

S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969) 18

MISCELLANEOUS

Fed. R. App. P. 4 10
Fed. R. Civ. P. 54(b) 3
Sup. Ct. R. 10(a) 12, 13

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent The Burlington Northern & Santa Fe Railway Company ("Santa Fe") respectfully requests that this Court deny the Petition for Writ of *Certiorari* ("Petition") submitted by petitioner State Board of Equalization of the State of California.

OPINIONS AND JUDGMENTS BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit in *Atchison, Topeka & Santa Fe Ry. v. California State Board of Equalization*, Nos. 98-16128, 98-16139, 98-16375, entered on November 13, 1998, was unreported and is reprinted in Appendix A to the Petition

("Pet. App."). The order and judgments of the United States District Court for the Northern District of California in *Atchison, Topeka & Santa Fe Ry. v. State Board of Equalization, et al.*, Nos. C-89-4030DLJ and C-95-3532DLJ, are not reported and are reprinted in Appendix B to the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant provisions of the United States Constitution, the Constitution of the State of California, the United States Code and the California Revenue and Tax Code are set out on pp. 2-4 of the Petition and are reprinted in Appendix D to the Petition.

STATEMENT OF THE CASE

This petition for *certiorari* presents the "second bite at the apple" of appellate review for petitioner California State Board of Equalization (the "Board"). The Board seeks review by this Court of an order of the Ninth Circuit Court of Appeals, which summarily affirmed the district court's summary judgment in favor of respondent Santa Fe declaring that the Board's assessment and collection of taxes for tax years 1991 and 1993 were foreclosed by prior orders and injunctions of the same court prohibiting those taxes. *See* Pet. App. B at 28. In its Petition, the Board raises a wholly different issue—whether Congress validly abrogated state sovereign immunity to permit railroads to sue states for discriminatory taxation practices. *See* Pet. at 9.

Santa Fe originally brought this action against the Board and sixteen California counties, challenging the assessment and collection of certain ad valorem taxes against railroad property as violative of Section 306 of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501 (Supp. I 1995) ("4-R Act"). In late

1993, the district court held a four-day trial concerning Santa Fe's claims for tax years 1989 through 1992. After conclusion of the trial, but prior to the district court's ruling, Santa Fe amended its complaint to include an identical claim for tax year 1993. Pursuant to a stipulated preliminary injunction order entered on December 2, 1993, the district court enjoined the collection of the disputed 1993 taxes "pending the determination" of the trial relating to the 1989-1992 tax years. *See Atchison, Topeka & Santa Fe Ry. v. State Bd. of Equalization California*, MCN C-81-4365, Stipulated Order for Preliminary Injunction as to 1993 Taxes of the Atchison, Topeka & Santa Fe Railway Company (N.D. Cal. Dec. 2, 1993) (reprinted in Appendix to Respondent's Brief in Opposition ("Resp. App.") at 1a, 3a).

On June 7, 1994, the district court issued an order resolving all the claims that had been tried before it, finding that the Board's taxes for tax years 1989 through 1992 violated the 4-R Act's prohibition against discriminatory taxes. *See* Resp. App. at 6a-26a. On September 7, 1994, the court entered its findings of fact and conclusions of law relating to the trial, holding, *inter alia*, that "the same legal principles set forth herein will apply to the resolution" of the 1993 tax assessments. *See id.* at 27a, 38a. On September 12, 1994, the district court entered partial judgment, pursuant to Fed. R. Civ. P. 54(b), in favor of Santa Fe with respect to tax years 1989 through 1992. *See id.* at 39a-41a.

The Board did not timely appeal this partial judgment order, nor did it timely file a post-judgment motion for relief from the judgment. Instead, the Board merely complained at a post-trial status conference that the monetary relief contained in the district court's partial judgment order was overstated. At a status conference in February 1995, the district court ordered the Board to submit a

proposed modified partial judgment with a corrected refund amount. The Board subsequently filed its proposed modified judgment, which the district court entered in April 1995. It was only then, on May 23, 1995, that the Board sought to appeal the district court's order, challenging the substance of the original partial judgment. *See* Pet. App. B at 4-5. The Ninth Circuit dismissed the appeal as untimely, concluding that, because a timely notice had not been filed, "[t]he original Partial Judgment became final when entered" on September 12, 1994. *See Atchison, Topeka & Santa Fe Ry. v. California State Bd. of Equalization*, 102 F.3d 425, 427 (9th Cir. 1996).

That ruling did not end the proceedings. On May 23, 1995, the same day it filed its untimely notice of appeal, the Board sent Santa Fe a notice of assessment for certain of Santa Fe's property for tax year 1991, even though an identical tax on the same property for the same tax year had been invalidated in the district court's September 12, 1994 order.[1] On October 4, 1995, Santa Fe filed a new lawsuit, alleging that the 1991 repeat assessment was barred by the district court's September 12, 1994 final order enjoining its assessment and collection. That action was consolidated with Santa Fe's pending challenge to the 1993 assessment—the subject of the December 2, 1993 stipulated injunction—and similar Section 306 claims brought by the Southern Pacific Transportation Company ("Southern Pacific"), Napa Valley Wine Train, Inc. ("Wine Train") and the Stockton Terminal & Eastern Railroad Company ("Stockton Terminal"). Santa Fe and Southern Pacific subsequently filed motions for leave to amend their complaints with respect to the 1993 tax assessments to add as parties the individual members of the

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[1] Indeed, the Board admitted in its answer to Santa Fe's complaint regarding this second 1991 assessment that the prior trial involved "identical parties and identical issues."

Board in their official capacities. *See* Pet. App. B at 17 & n.7.

On April 10, 1997, Santa Fe filed motions for summary judgment on its claims for relief from the 1991 and 1993 assessments. The Board simultaneously filed a motion to dismiss the claims of all the railroad plaintiffs, arguing that, in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the claims were barred by Eleventh Amendment sovereign immunity.

The district court agreed with the Board that the Eleventh Amendment barred relief under Section 306, dismissing the claims filed by Southern Pacific, Wine Train and Stockton Terminal.[2] Despite its ruling with respect to the Eleventh Amendment issue, however, the district court granted Santa Fe's motion for summary judgment, ruling that the relief sought by Santa Fe was warranted on other grounds. With respect to Santa Fe's 1991 tax year claim, the district court ruled that *Seminole Tribe* could not be applied retroactively because the district court's previous partial judgment barring an identical 1991 assessment had become final prior to the *Seminole Tribe* decision: "[B]ecause a final order and a judgment has already been entered by the Court with respect to all of the Santa Fe assessments for tax years 1989 through 1992, the Court shall grant summary judgment for Santa Fe . . . regarding the 1991 Escape Assessment." Pet. App. B at 28. "In

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[2] In response to an appeal by Southern Pacific, the Ninth Circuit summarily reversed this holding, in light of its prior ruling in *Oregon Short Line R.R. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998), that Congress validly abrogated California's sovereign immunity in federal court in enacting Section 306. The Board's petition for *certiorari* review of the Ninth Circuit's Southern Pacific decision is currently pending. *See State Bd. of Equalization California v. Southern Pac. Transp. Co.*, No. 98-584 (filed Oct. 5, 1998).

addition," the court ruled, "because the stipulated injunction with respect to tax year 1993 became permanent when the Ninth Circuit dismissed the Board's appeal, the Court grants summary judgment with respect to the 1993 . . . assessment as well." *Id.*[3] The district court subsequently denied the Board's motion to alter or amend this order.

The Board appealed the district court's summary judgment order. Subsequent to the district court's order, the Ninth Circuit decided *Oregon Short Line R.R. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998), in which it concluded that Congress validly abrogated state sovereign immunity in enacting Section 306 of the 4-R Act. On August 31, 1998, Santa Fe filed in the Ninth Circuit a motion for summary affirmance of the district court's order. The Board did not file any opposition to this motion. On November 13, 1998, a panel of the Ninth Circuit granted Santa Fe's motion without substantive comment, holding, "Appellee's unopposed motion for summary affirmance of these consolidated appeals is granted . . . . The district court judgment is affirmed." *See* Pet. App. A at 1 (citation omitted). The Board subsequently filed a timely petition for *certiorari* in this Court.

REASONS FOR DENYING THE WRIT

The Board's Petition should be denied for several reasons. *First*, while the Board asks the Court to decide whether Section 306 of the 4-R Act validly abrogates state sovereign immunity under Section 5 of the Four-

[3] Although it had granted all the relief sought by Santa Fe against the Board, the district court went on to deny the motion of Santa Fe, as well as the motion of Southern Pacific, for leave to amend their complaints to seek *Ex parte Young* relief against the individual members of the Board. *See* Pet. App. B. at 17-22.

teenth Amendment, the lower courts' orders were based on independent, alternative grounds. In a decision that was summarily affirmed by the Ninth Circuit, the district court ruled that its prior judgments regarding 1991 and 1993 tax years were final prior to the instant actions. Indeed, according to the district court, those prior judgments were final in September 1994, well before this Court's decision in *Seminole Tribe*, holding that Congress could not abrogate state sovereign immunity pursuant to its powers under the Commerce Clause. Retroactive application of the *Seminole Tribe* rule is thus inappropriate under the circumstances of this case, and the issue raised in the Board's Petition need not be decided here. Moreover, the *res judicata* and collateral estoppel issues actually addressed by the district court turn on the unique facts of this case and present no issue warranting review by this Court.

Second, granting the Board the relief it seeks here would not necessarily end this litigation because Santa Fe has sought injunctive relief against the individual members of the Board in their official capacities pursuant to *Ex parte Young*, 209 U.S. 123 (1908). The only circuit court that has addressed this issue has affirmed the railroads' right to sue state officials pursuant to *Ex parte Young* for violations of Section 306. *See CSX Transp., Inc. v. Board of Pub. Works W. Va.*, 138 F.3d 537 (4th Cir.), *cert. denied*, 119 S. Ct. 63 (1998). That issue has not yet been addressed by the court of appeals in this case.

Third, there is, in any event, no conflict among the circuit courts of appeals that have addressed the sovereign immunity question presented in the Petition.

Finally, the Petition should be denied because, to the extent the Ninth Circuit's summary affirmance can be read to hold that Congress in Section 306 validly abro-

gated the State of California's Eleventh Amendment sovereign immunity from suit in federal court, it is consistent with this Court's jurisprudence.

I. THE DISTRICT COURT'S JUDGMENT, WHICH WAS SUMMARILY AFFIRMED BY THE COURT OF APPEALS, RESTS ENTIRELY ON GROUNDS INDEPENDENT FROM THE QUESTION PRESENTED HERE.

The primary reason for denying the Petition in this case is that, even if this Court were to grant the relief sought by the Board (*i.e.*, a holding that Section 306 does not validly abrogate California's Eleventh Amendment immunity), the lower courts' judgments rest on independent and adequate alternative grounds that are unique to this dispute. The district court's judgment, summarily affirmed without opposition from the Board or comment by the Ninth Circuit, held that its prior judgments regarding the 1991 and 1993 tax years became final when entered on September 12, 1994, as a result of the Board's failure to file a timely appeal. *See* Pet. App. B at 28. Consequently, under the district court's reasoning, application of *Seminole Tribe* to this case would constitute retroactive application of that decision to a controversy that had been finally decided before the *Seminole Tribe* decision was issued—a result that would clearly be improper. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).[4]

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[4] Prior to this Court's *Seminole Tribe* decision, this Court had held that Congress could abrogate state sovereign immunity pursuant to its Article I Commerce Clause power. *See Pennsylvania v. Union Gas*, 491 U.S. 1 (1989); *Hale v. Arizona*, 933 F.2d 1387, 1391 (9th Cir.), *cert. denied*, 510 U.S. 946 (1993). In this case, the Board does not contend that Section 306 cannot be justified as an exercise of Congress's Commerce Clause power; indeed, it argues here that Section 306 is *primarily* based on the Commerce Clause. Pet. at 10-11. Under the case law in effect at the time the issues in

The Board contends that *Harper* demands the application of the rule of *Seminole Tribe* to this case because this particular civil action was currently pending on March 27, 1996, when *Seminole Tribe* was decided. Pet. at 9-10 n.3. The Board misses the point, however. While the instant civil action was pending at the time *Seminole Tribe* was decided, the case involved adjudication of issues that had been *finally and conclusively decided* in prior litigation. In its September 12, 1994 order, the district court had concluded that the Board's 1991 assessment of Santa Fe's property violated Section 306 and thus had enjoined its collection. *See* Resp. App. at 6a-26a. Moreover, according to the district court, the stipulated preliminary injunction prohibiting the assessment and collection of the 1993 taxes became permanent as a result of the court's September 12, 1994 order. *See* Pet. App. B at 28. Both orders became final when the Board failed to file a timely notice of appeal on October 14, 1994, the 30-day deadline for filing a notice. *See Atchison, Topeka & Santa Fe Ry. v. California State Bd. of Equalization*, 102 F.3d at 427 (as result of Board's failure to appeal in timely manner, "[t]he original Partial Judgment became final when entered"). Thus, *Seminole Tribe* could not be applied retroactively to the assessment and collection of taxes for these years. *See Harper*, 509 U.S. at 97 (retroactive application of decision applies only to cases still open at the time of announcement of new rule). That result does not change simply because the Board subsequently attempted to assess an identical tax on the same property for the same tax year, as it did with the second 1991 assessment, thereby forcing Santa Fe to file another lawsuit to protect the judgment previously entered in its

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this case were finally decided, the Board's sovereign immunity defense could not have prevailed.

favor.[5] The Board cannot seek to apply *Seminole Tribe*, a decision reached more than a year after the district court's original judgment was final, simply by relitigating the precise issues previously decided.

In sum, the district court's rationale—summarily affirmed by the Ninth Circuit—principally rests on simple notions of *res judicata* and collateral estoppel.[6] To the extent that the applicability of *Seminole Tribe* is at issue at all, it is inextricably entwined with the unique facts of this case, including the *res judicata* and collateral estoppel issues on which the district court based its decision.

II. GRANTING THE RELIEF SOUGHT BY PETITIONER WOULD NOT END THIS LITIGATION.

A conclusion that Congress did not validly abrogate Eleventh Amendment immunity in enacting Section 306 would not end the inquiry regarding the permissibility of the requested injunctive relief in this case. While the case

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[5] Federal Rule of Appellate Procedure 4 provides that a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. Fed. R. App. P. 4(a). This Court has repeatedly held that this "30-day time limit is 'mandatory and jurisdictional.'" *Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978). Thus, as the Ninth Circuit held in this case, a judgment becomes final, as of the date of the judgment, when an aggrieved party fails to meet the 30-day jurisdictional deadline. 102 F.3d at 427. It is irrelevant that the Ninth Circuit's decision reaching this conclusion was not issued until sometime in 1996, for the court of appeals lacked jurisdiction as soon as the Board failed to appeal in a timely manner.

[6] The district court's reliance on this alternative rationale is made even more obvious by the fact that, in the same order on review here, the district court *did apply* the rule of *Seminole Tribe* to foreclose similar claims brought by Southern Pacific, Wine Train and Stockton Terminal. *See* Pet. App. B at 16. Unlike Santa Fe's claims as to 1991 and 1993 tax years, the claims of Southern Pacific and the two other railroads had not been finally decided prior to the *Seminole Tribe* decision.

was pending in the district court, Santa Fe moved to amend its complaint to add as defendants the individual members of the Board in their official capacity, seeking injunctive relief pursuant to the well-settled principles of *Ex parte Young*. While the district court denied that motion, the Court of Appeals has yet to consider the propriety of that denial, instead summarily affirming the decision of the district court, which granted relief against the Board itself.[7] Were this Court to conclude that Section 306 is not "appropriate" legislation to enforce the Equal Protection Clause and that the Board's defenses are not otherwise barred, Santa Fe would still be entitled to injunctive relief against these state officials. As this Court has held, under the *Ex parte Young* doctrine, a federal court may consider claims for injunctive relief against a state official "to prevent . . . continuing violation[s] of federal law," without running afoul of the Eleventh Amendment. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citation omitted). At least one federal court of appeals has specifically ruled that *Ex parte Young* relief is available for violations of the anti-discrimination provisions of Section 306. *See CSX Transp., Inc. v. Board of Pub. Works W. Va.*, 138 F.3d 537 (4th Cir.), *cert. denied*, 119 S. Ct. 63 (1998). Consequently, Santa Fe would still be able to obtain complete relief in this case, notwithstanding an unfavorable decision from this Court regarding the question presented by the Petition.

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[7] It is not clear why the district court addressed Santa Fe's motion for leave to amend its complaint to seek *Ex Parte Young* relief at all, since it ruled in the same order that Santa Fe's motion for summary judgment against the Board itself should be granted.

III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF SECTION 306.

Even apart from the serious procedural obstacles raised by the Petition, review of the decision below is also unwarranted because there is no conflict in the circuits with respect to the issue presented. *See* Sup. Ct. R. 10(a). To date, only two circuit courts of appeals have addressed the question presented by the Petition—whether, in enacting Section 306 of the 4-R Act, Congress validly abrogated state sovereign immunity pursuant to its authority to enforce the Fourteenth Amendment's guarantee of equal protection of the laws. Both courts, applying this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), have concluded that Section 306 is "appropriate" enforcement legislation under the Fourteenth Amendment and thus validly abrogates Eleventh Amendment sovereign immunity. *See Oregon Short Line R.R.*, 139 F.3d at 1266-67; *Wheeling & Lake Erie Ry. v. Public Util. Comm'n of Pa.*, 141 F.3d 88, 92-94 (3d Cir. 1998).[8]

The reasoning of both courts of appeals is remarkably similar. In *Oregon Short Line*, the Ninth Circuit held that Congress has the authority, under Section 5 of the Fourteenth Amendment, to enact legislation targeted at "taxation schemes which do not rest 'upon some reasonable consideration of difference or policy . . . .'" 139 F.3d at 1266 (citing, *inter alia, Allegheny-Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 344 (1989)). "It is just that type of unreasonable classification and discrimination," the court reasoned, "that § 11501 was de-

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[8] Because it concluded that railroads could get complete relief by suing state officials for injunctive relief pursuant to *Ex parte Young*, the Fourth Circuit expressly declined to reach the Section 5 question in *CSX Transp., Inc.*, 138 F.3d at 540 n.4.

signed to correct." *Id.* at 1267. Relying upon congressional findings that railroads were " 'easy prey for State and local tax assessors in that they are non-voting, often non-resident, targets for local taxation, who cannot easily remove themselves from the locality' " and that " 'railroads are overtaxed by at least $50 million each year'," the court held that the congressional purpose was permissible under the Equal Protection Clause. *Id.* at 1267 (citations omitted). Applying the standards of *City of Boerne*, the court held that the "statute may be regarded as an enactment to enforce the equal protection clause, is consistent with the Constitution, is adapted to its ends, and does not provide remedies that are disproportionate to the desired goal of eliminating discrimination." *Id.*

In *Wheeling*, decided only days after *Oregon Short Line*, the Third Circuit independently reached the identical conclusion: "It is evident to us that Congress recognized the potential for state and local taxing authorities to discriminate against railroads in violation of their Equal Protection rights under the Fourteenth Amendment." 141 F.3d at 93. Applying this Court's *City of Boerne* rationale, the Third Circuit concluded that the remedy enacted by Section 306 "is not out of proportion to its objective" of preventing unconstitutional discrimination against the railroads. *Id.* at 94. Thus, it upheld Section 306 as "appropriate" enforcement legislation. No court of appeals has reached a contrary conclusion. In this circumstance, there is clearly no reason for review by this Court. *See* Sup. Ct. R. 10(a).

IV. TO THE EXTENT THE COURT OF APPEALS' DECISION IS BASED UPON THE CONCLUSION THAT SECTION 306 VALIDLY ABROGATED STATE SOVEREIGN IMMUNITY, IT IS CORRECT.

The precise basis for the court of appeals' summary affirmance cannot be discerned from its order. The Board contends that the summary affirmance was based entirely upon the Ninth Circuit's prior decision in *Oregon Short Line*, that Congress validly abrogated state sovereign immunity in enacting Section 306. Pet. at 1. The district court's decision with respect to Santa Fe, however, was based entirely on *res judicata* and collateral estoppel grounds. *See* discussion *supra* Section I. Nevertheless, assuming that the Ninth Circuit's summary affirmance order stands for the proposition that Section 306 effects a valid abrogation of California's state sovereign immunity, it is perfectly consistent with this Court's jurisprudence defining the scope of congressional authority to enforce the substantive protections of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 5. For this additional reason, the petition should be denied.

After this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, congressional power to abrogate the States' sovereign immunity from suit in federal court is limited to legislation enacted under Section 5 of the Fourteenth Amendment ("Section 5"). Section 5 authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5. Unquestionably encompassed within this congressional authority is the power to enforce the Amendment's guarantee of equal protection of the laws. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966).

This Court has long viewed Congress's power under the enforcement clauses of the Civil War Amendments as equally broad as congressional authority under the Nec-

essary and Proper Clause of Article I, § 8, cl. 18. *See Morgan*, 384 U.S. at 650. Shortly after the adoption of the Amendment, the Court explained the scope of congressional authority thereunder:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879); *see also City of Boerne*, 117 S. Ct. at 2165.

The standard applied by the Court in determining whether legislation is "appropriate" under Section 5 was explained in *Katzenbach v. Morgan*, 384 U.S. at 651, and later refined in *City of Boerne*, 117 S. Ct. at 2164. The Court asks three questions in order to gauge whether legislation is "appropriate" under Section 5. First, the Court asks whether the legislation "may be regarded as an enactment to enforce" the substantive provision of the Fourteenth Amendment, such as the Equal Protection Clause. 384 U.S. at 651. Second, the Court inquires "whether it is 'plainly adapted to that end.' " *Id.* (citation omitted). Finally, the Court asks whether the legislation "is not prohibited by but is consistent with 'the letter and spirit of the constitution.' " *Id.* (footnote and citation omitted).

City of Boerne illuminated these standards. There, the Court considered whether Congress had the power to subject the States to the Religious Freedom Restoration Act ("RFRA") under Section 5. Congress enacted RFRA in response to this Court's decision in *Employment Div., Dep't of Human Resources Oregon v. Smith*, 494 U.S. 872 (1990), which held that laws of general applicability

may incidentally burden religious practices even when not supported by a compelling governmental interest. *City of Boerne*, 117 S. Ct. at 2161. In RFRA, Congress drastically altered the governing standard, instead requiring that, where a generally-applicable law places a substantial burden on the free exercise of religion, that law may survive only if justified by a compelling governmental interest and narrowly tailored to that interest. *Id.* at 2162.

The Court held that RFRA could not be justified as "appropriate" enforcement legislation under Section 5. In doing so, it expounded on the nature of Congress's "broad" power under that provision. *See id.* at 2163. In order to cross the initial threshold of permissibility under Section 5, legislation must "enforce" the provisions of the Fourteenth Amendment. *Id.* at 2164. "The Court has described this power as 'remedial.'" *Id.* That does not mean, however, that Congress is limited to enacting legislation that targets only state action previously found unconstitutional by the courts. Importantly, the *City of Boerne* Court reasoned that Congress's authority to legislate under Section 5 *extends to the prohibition of state action that is otherwise permissible under the Equal Protection Clause*:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States."

Id. at 2163 (citation omitted). Thus, so long as the legislation targets some category of unconstitutional state action, it may in the course of prohibiting that conduct also prohibit some degree of otherwise constitutional conduct. *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 279 (1997) ("Congress pursuant to its

§ 5 remedial powers under the Fourteenth Amendment may abrogate sovereign immunity, even if the resulting legislation goes beyond what is constitutionally necessary . . . ."); *Morgan*, 384 U.S. at 649 (determining appropriateness of congressional exercise of enforcement power "[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement").

Consequently, after *Boerne*, *Morgan*'s threshold determination of whether legislation "may be regarded as an enactment to enforce" the Fourteenth Amendment does not require a pre-enactment ruling that all of the practices prohibited by the legislation are unconstitutional. Rather, it merely requires that the legislation, as applied in some circumstances, would reach some subset of state conduct that likely would be unconstitutional. "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a *significant likelihood* of being unconstitutional." *City of Boerne*, 117 S. Ct. at 2170 (emphasis added).

After determining, as a threshold matter, whether Congress has the *power* to act, *City of Boerne* next examines whether the legislative means chosen are permissible. This inquiry requires the Court to examine the proportionality of the legislation to the perceived constitutional threat. In order to fall squarely within the enforcement power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. As part of that inquiry, the Court examines the scope of the legislation and the qualifications and limitations placed upon its applicability by Congress. If sufficiently restricted in scope, application or remedy, legislation may be valid even if it "*pervasively prohibits* con-

stitutional state action in an effort to remedy or prevent unconstitutional state action . . . ." *Id.* at 2170 (emphasis added).[9]

As applied in this case, the relevant *Morgan/City of Boerne* tests for determining "appropriateness" demonstrate that the congressional abrogation of state sovereign immunity effected by Section 306 is valid. Indeed, Section 306 is a classic case of Congress's use of its Section 5 enforcement power to remedy a violation of the Fourteenth Amendment's Equal Protection Clause. *See Wheeling*, 141 F.3d 88; *Oregon Short Line*, 139 F.3d 1259. As the lower courts have observed, Congress heard substantial evidence that States were engaging in invidious discrimination against interstate railroads: "Unfortunately, interstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals." S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969). Confronted with evidence that "the railroads ha[d] been assessed more than $900 million in discriminatory taxes" during a nine-year period ending in the late 1960's, *id.* at 3, and the absence of a "plain, speedy, and efficient remedy," in state or federal courts, *id.* at 7, Congress enacted legislation providing a modest remedy—the right to sue an offending state in federal court "to prevent a violation" of the 4-R Act's pro-

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[9] *City of Boerne* ultimately held that RFRA could not survive this scrutiny. Unlike the 4-R Act, RFRA had nearly unlimited application, "ensur[ing] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." 117 S. Ct. at 2170. The Court held that such a draconian remedy was not justified by the minimal constitutional threat addressed by the legislation, *i.e.*, laws of general applicability that are "enacted with the unconstitutional object of targeting religious beliefs and practices." *Id.* at 2168.

hibition against discriminatory state taxation of railroads. *See* 49 U.S.C. § 11501(c).

Congress unquestionably had the *power* to enact Section 306 under Section 5. *See City of Boerne*, 117 S. Ct. at 2164.[10] The legislation was enacted to address what Congress perceived as impermissible discrimination against a discrete class of individuals. As one court that has upheld the Act reasoned, "there can be little doubt that discriminatory state taxation can implicate equal protection concerns." *Oregon Short Line*, 139 F.3d at 1266.

Congress's goal in adopting Section 306—preventing invidious discrimination against the railroads—is clearly a legitimate Fourteenth Amendment objective. In examining state taxation practices regarding interstate railroads, Congress could have determined that state practices violate the Equal Protection Clause in numerous circumstances. First, states run afoul of the constitutional guarantee of equal protection by subjecting railroads as a class to invidious discrimination. *See Morgan*, 384 U.S. at 656 ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that [the challenged state law] . . . constituted an invidious discrimination in violation of the Equal Protection Clause."); *see also United States v. Uvalde Consol. Indep. Sch. Dist.*, 625

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[10] For this reason, it is irrelevant, as the Board contends, Pet. at 11, that Congress did not *expressly* rely upon its Fourteenth Amendment enforcement power in enacting Section 306. "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Congress's power to legislate under Section 5 does not depend upon the ability of congressional staff to write a persuasive brief in support of that power, but rather, upon whether Congress *could have* so acted. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) ("That does not mean . . . that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection' " in order to invoke its power).

F.2d 547, 553 (5th Cir. 1980) ("Congress's power under Section 5 of the fourteenth amendment clearly extends to protection of any group of persons invidiously discriminated against by state law . . . ."), *cert. denied*, 451 U.S. 1002 (1981).

Second, as the Ninth Circuit concluded in *Oregon Short Line*, Congress also could have determined that states violate the equal protection clause where they apply otherwise neutral state tax laws in a discriminatory manner against the railroads. *See Allegheny-Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). Thus, to the extent Section 306 addresses the unequal assessment practices of the States, its purpose is clearly legitimate under the equal protection clause.

Section 306 is also the paradigm of a proportionate legislative response to Congress's legitimate perception of unconstitutional discrimination by the States. First, Congress sought to blunt the burden that Section 306 placed upon the States by giving states a three-year grace period to bring their property taxation systems into compliance with its statutory prohibitions. *See Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 458 (1987). Second, the remedial provisions of Section 306 are narrowly tailored "to prevent[ing] a violation" of the 4-R Act's anti-discrimination provisions. 49 U.S.C. § 11501(c). Thus, railroads generally have recourse only to equitable and declaratory relief.[11] Moreover, courts are not permitted to enjoin collection or assessment of all state railroad taxes, but only the discriminatory portion of the state tax. Finally, in most cases, Section 306 permits

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[11] *See* Pub. L. No. 94-210, § 306(2), 90 Stat. 31, 54 (1976) (permitting federal courts "to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of" Section 306).

relief only where railroads can show that the assessed value of their property is at least five percent greater than similar commercial and industrial property. 49 U.S.C. § 11501(c). Thus, where there is only a minimal level of discrimination, federal courts have no power to interfere under Section 306, even if that discrimination might itself violate the Equal Protection Clause.[12]

Because Section 306 is a proportionate response to a legitimate constitutional threat—discrimination against the railroads by the States in their taxation practices—it is valid enforcement legislation under Section 5 of the Fourteenth Amendment.[13] To the extent the Ninth Circuit's summary affirmance can be read to reach this result, it is perfectly consistent with this Court's Fourteenth Amendment jurisprudence. Further review is thus unnecessary.

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[12] Because Section 306 provides such a limited remedy to railroads injured by discrimination, this Court's ruling in *Nashville Chatanooga & St. Louis Ry. v. Browning*, 310 U.S. 362 (1940), that certain disparate classification practices involving railroad property do not violate the Equal Protection Clause, does not condemn the statute. So long as Congress seeks to address some subset of unconstitutional state conduct, it can, in the process, prohibit otherwise constitutional practices, such as the disparate classifications upheld in *Browning*, provided only that the remedy is proportionate. *See City of Boerne*, 117 S. Ct. at 2163; *Morgan*, 384 U.S. at 649.

[13] Of course, in all cases, the Court must also examine the third question under *Morgan* and *City of Boerne*—whether the legislation is consistent with the letter and spirit of the constitution. *Morgan*, 384 U.S. at 651. Petitioners do not allege here, however, that Section 306 is inconsistent with some independent constitutional prohibition; thus, this issue is not separately addressed.

CONCLUSION

For the reasons stated herein, the petition for *certiorari* filed by the California State Board of Equalization should be denied.

Moreover, although the Court has recently granted *certiorari* to review three cases implicating the scope of Congress's power under Section 5 of the Fourteenth Amendment,[14] the Petition should not be held pending those decisions. Immediate denial of the Petition is appropriate in light of the unique, alternative grounds upon which the district court's ruling rested.

Respectfully submitted,

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[14] *See College Sav. Bank v. Florida Prepaid Postsecondary Expense Bd.*, No. 98-149; *Florida Prepaid Postsecondary Expense Bd. v. College Sav. Bank*, No. 98-531; *Kimel v. Florida Bd. of Regents*, Nos. 97-791, 98-796.

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Master Consolidated
Number C 81-4365 DLJ

No. C 89-4030 DLJ

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
a Delaware corporation,

Plaintiff,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

STIPULATED ORDER FOR PRELIMINARY INJUNCTION AS TO 1993 TAXES OF THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

Pursuant to stipulation and without waiver of rights by any party with respect to any permanent injunction requested by plaintiff in this action, and subject to plaintiff's compliance with the security provisions set forth in paragraph 7,

IT IS HEREBY ORDERED THAT:

1. With respect to those rail transportation properties which were valued by the defendant Board on a nonunitary basis and identified by property class codes 891, 892, and 893, other than class code 891 and 892 property leased and solely used by Amtrak, and for which the defendant Board has afforded or affords plaintiff some assessment ratio relief by assessing 1993 *ad valorem* property taxes at a 74.93% ratio, the defendants, their agents, servants, employees and attorneys, and all persons acting for or in concert or in participation with them be, and hereby are, restrained and enjoined pending the determination of this action, or further order of this Court, from collecting or seeking to collect any portion of the ad valorem taxes billed for the 1993 tax year. Any disagreement which the parties cannot resolve concerning the property afforded relief pursuant to this paragraph shall be brought to the court's attention and shall be resolved by further Order of this Court.

2. Plaintiff in this action, in the absence of an intervening order of this Court, shall pay for the 1993 tax year 0.0% of the *ad valorem* taxes levied on its rail transportation properties which are described in the preceding Paragraph 1. Plaintiff may retain 100.0% of the taxes billed against such property for the 1993 tax year with respect to such properties.

3. Defendants, their agents, servants, employees and attorneys, and all persons acting for or in concert or in participation with them be, and hereby are, restrained and enjoined pending the determination of this action, or further order of this Court, from collecting or seeking to collect more than 79.5% of the *ad valorem* taxes billed on Plaintiff's rail transportation property valued by the Board as a unit for the 1993 tax year and on all re-

maining nonunitary property for which the defendant Board has afforded or affords plaintiff some assessment ratio relief by assessing 1993 *ad valorem* property taxes at a 74.93% ratio, including nonunitary property in class codes 11, 12, 41, 42, 43 and all class code 891 and 892 property leased and solely used by Amtrak.

4. Plaintiff in this action, in the absence of an intervening order of this Court, shall pay for the 1993 tax year 79.5% of the *ad valorem* taxes levied on its rail transportation properties which are described in the preceding paragraph 3. Plaintiff may retain the remaining 20.5% of the taxes billed against such property for the 1993 tax year with respect to such properties.

5. Pending the determination of this action or further order of this Court, defendants, their servants, employees, agents, attorneys and all persons acting for, or in concert, or in participation with them, shall be and hereby are, restrained and enjoined from recording any tax lien or any other form of encumbrance on the property of the plaintiff in this action or initiating any other enforcement proceedings as a result of such plaintiff's failure to pay the percentage of *ad valorem* taxes enjoined by this Order.

6. Pending the determination of this action or further order of this Court, defendants, their servants, employees, agents, attorneys, and all persons acting for or in concert or in participation with them, shall accept payments in the amount specified in the preceding Paragraphs 1 through 4 as full payment of the *ad valorem* property taxes assessed on the rail transportation property of plaintiff in this action and shall be restrained and enjoined from imposing any penalty on such plaintiff or its property as a result of the plaintiff's failure to pay the percentage of *ad valorem* taxes enjoined by this Order.

7. On or before December 10, 1993, plaintiff shall secure payment of the *ad valorem* taxes enjoined herein by providing security for the taxes at issue, or for any taxes that are ultimately adjudged to be due, by providing to defendants one of the following:

a. A verified financial statement establishing sufficient net worth to pay the taxes at issue, or the taxes ultimately adjudged to be due; or

b. A letter of credit satisfactory to the defendants for the taxes at issue or the taxes ultimately adjudged to be due.

Any disagreement concerning the form or sufficiency of the security which the parties cannot resolve shall be brought to the Court's attention and resolved by further order of the Court.

8. This order is without prejudice to the right of any party to move for a modification or termination of this order on the basis of any admissible evidence or argument without regard to whether such evidence was or could have been presented at or before the hearing of the matter.

ORDERED on the 2nd day of December, 1993 and executed this 2nd day of December, 1993.

/s/ D. Lowell Jensen
D. LOWELL JENSEN
Judge,
United States District Court

APPROVED AS TO FORM:

/s/ Robert E. Murphy
ROBERT E. MURPHY
Deputy Attorney General
Attorney for Defendants
State Board of Equalization
of the State of California

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 89-4030 DLJ

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

ORDER

Trial in the above matter came to a close in October of 1993. The parties submitted written closing arguments, which were thereafter supplemented by further briefing following decision by the Supreme Court in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S. Ct. 843 (Jan. 24, 1994). The case now under submission, the Court enters judgment in favor of plaintiff and directs the parties to draft findings of fact and conclusions of law in the manner directed below.

BACKGROUND

Plaintiff to this action challenges the defendants' imposition of a tax upon a class of property which defend-

ants call Non-Unitary Railroad Property Eligible for 4-R Act Relief (hereinafter "NURPEFAR") throughout the years 1989 to 1992. *See* Fourth Amended Complaint at ¶ 40. Plaintiff contends this classification was created solely upon plaintiff's rejection of an offer to allow commuter trains to run on its tracks—the "Commuter Property", and upon plaintiff's stated intention to dispose of some of its property—the "Restructuring Plan Property". Arguing that neither defendant State Board of Equalization ("SBE") nor the local county assessors imposes such a tax on any other taxpayer, plaintiff contends the challenged practice works a violation of section 306(1)(d) of the federal Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) (codified in part at 49 U.S.C. § 11503).

Defendants justify their theory of taxation in the present case with reference to the "sticks" in a bundle of rights comprising property ownership. Defendants' Post Trial Br. at 17. "[F]or example, the right of an owner of a building to live in it is one stick, the right to rent it is another stick, and the right to sell it is yet another." *Id.* On this premise, defendants argue that "[w]hile all of the rights of ownership exist at all time not all the rights . . . necessarily have value at all time." *Id.* at 18.[1] Defendants argue these principles illuminate the present dispute, and support the legitimacy of defendants' attempts to tax, first, the value of that "stick" defined as the right to run commuter—as opposed to freight—trains, *id.*, and, second, that "stick" defined as plaintiff's stated intent to sell certain property.

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[1] For instance, defendants assert that while "the right to let others run their fiber optic cable over plaintiff's property existed in perpetuity," no value could have attached to that right before fiber optic cable existed. *Id.*

As to the former stick—the Commuter Property—the parties specifically refer to plaintiff's rejection of an offer to utilize plaintiff's train lines to run commuter trains for a consideration of $300 million. *See* Plaintiff's Trial Mem. at 5. From 1989 through 1992, plaintiff operated trains over the subject property for the purpose of transporting freight. *See* Stipulation as to Certain Facts—Santa Fe Witnesses at 3, Sept. 17, 1993. Although plaintiff "entered into negotiations to sell trackage rights in a portion of the Subject Property to various California transit authorities . . ., throughout the tax years 1989 through 1992, [plaintiff] continued to operate [the property in question] as a part of its operating unit in its primary function of transporting freight for hire." *Id.* Prior to January 1, 1992, plaintiff had not sold any of this property,[2] *id.* at 4; Plaintiff's Trial Mem. at 7, and prior to the 1992 assessment, the SBE had assigned no value to this interest. *See* Defendants' at 19; Hale Test., R.T. at 28-29. By the time of the 1992 assessment date, however, the SBE was informed that a consortium of counties had offered to buy the right to run commuter trains, and that the offer was refused. Defendants' Post Trial Br. at 19. Plaintiff contends these property interests were then designated as class codes 1 and 891 in the tax year 1992. *See* Plaintiff's Trial Mem. at 3.[3]

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[2] After January 1, 1992, plaintiff sold trackage rights and fee interests in portions of the Commuter Property, subject to freight easements allowing plaintiff continued use of the property for freight operations. *See* Plaintiff's Trial Mem. at 7; Stipulation as to Certain Facts—Santa Fe Witnesses at 3, Sept. 17, 1993.

[3] As explained below, class code descriptions ending in "1" refer to railroad *land* improvements; class code descriptions ending in "2" refer to railroad *improvements*. *See* Plaintiff's Trial Mem. at 3 n.3. For tax year 1989 only, there is additionally a small amount of class code "3" property—unitary personal property—which the SBE reclassified as class code 193 property—operating non-unitary personal property. *Id.*

As defendants frame the issue, the SBE used "all of the relevant data available" and "considered the rejected offer in valuing plaintiff's property." Defendant's Post Trial Br. at 19.

> The process of valuing the commute stick was no different than valuing any other non-unitary property. The basic question in valuing property is: what would a willing buyer pay a willing seller for the property at issue. . . . Here the Board knew there was a willing buyer who would pay $300 million for the property at issue. But the seller was not willing to sell at that price so the $300 million did not represent the fair market value. But because a buyer was willing to pay this $300 million the Board determined that it represented a minimum value—a floor—for the property at issue. As a result the Board used the $300 million rejected offer as a first step in calculating the assessed value to be assigned to the commute rights.

Defendants' Post Trial Br. at 19-20. In sum, defendants characterize their actions as utilizing "standard assessment procedures . . . to establish a very conservative minimum value." *Id.*

As to the latter stick in question—the Restructuring Plan Property—defendants used a list of properties to be disposed of in plaintiff's restructuring plan as a basis for establishing a new value for those properties. This value was then added to the total value of plaintiff, and thus considered for tax purposes for the years 1989 through 1992. *See* Plaintiff's Trial Mem. at 3; Defendants' Post Trial Br. at 2; Defendants' Closing Br. at 2. Specifically, the chronology is as follows: In 1986, plaintiff's Chairman of the Board announced that plaintiff intended to dispose of approximately 3,100 miles of track

over a period of five years to attempt to improve plaintiff's financial condition. *See* Plaintiff's Trial Mem. at 6. The property would be disposed of by offering it for sale or filing applications with the ICC to abandon railroad operations on these segments of the railway system. *Id.* Only a small portion of this track—approximately 337 miles—was located within the State of California. *Id.*

By 1989, plaintiff announced a revised restructuring plan which also called for disposing of approximately 3,100 miles of track—with approximately 366 miles in California, some of which was the same track identified in the 1986 plan. Plaintiff's Trial Mem. at 7. As of January 1, 1992, however, plaintiff had disposed of only three miles of the California track identified in the 1986 Restructuring Plan and only 154 miles of the California track identified in the 1989 Restructuring Plan. *Id.* Throughout the tax years 1989 to 1992, the SBE reclassified certain properties from unitary class codes 191 and 192 (which were changed for 1991 and 1992 to 891 and 892), based on these indicia that such properties might be sold or abandoned some time in the near future. Plaintiff's Trial Mem. at 3.

Defendants argue that these two sticks have been incorrectly viewed together for purposes of the present dispute, and that "two distinct situations [have been considered] as one under the rubric of NURPEFAR . . . ." Defendants' Closing Arg. at 2. Each of these sticks, it is true, is rooted in a separate soil. The Restructuring Plan Property, defendants argue, started as unitary property, but became non-unitary property, while the commercial lines were non-unitary property at all time. Defendants' Closing Arg. at 2. Plaintiff, by contrast, argues that, throughout tax years 1989 to 1992, *all* of the subject property was part of plaintiff's integrated railway

system and was "operated as a unit" by plaintiff "in its primary function" of transporting freight for hire. Plaintiff's Trial Mem. at 7. Accordingly, plaintiff argues it is properly within the statutory definition of "unitary property" provided by the California Revenue and Taxation Code. *See* Plaintiff's Trial Mem. at 7; Cal. Rev. & Tax. Code § 723.

Even assuming that defendants' characterization is the accurate one, the gravamen of the purported distinction is that, with respect to the rejected offer for the commuter lines, someone other than plaintiff established the valuation utilized by the SBE, whereas with the Restructuring Plan Property, the valuation was created by plaintiff itself. *See* Defendants' Closing Arg. at 3. Ultimately, this distinction is without meaningful difference. What governs the present analysis is not the fact that both sticks are, as conceded by defendants, properly labelled as NURPEFAR. *See* Defendants' Closing Arg. at 2. Rather the operative question is whether, looking beyond that label, a tax imposed on either of the sticks, viewed independently, is discriminatory within the meaning of subsection 306(1)(d). With respect to both the Commuter Property and the Restructuring Plan Property, the SBE took a value from the fact that plaintiff might—but did not actually—sell certain property interests. It is of little matter whether that possibility arose at the assessee's behest, as in the Restructuring Plan Property, or at the intimation of a third party, as with the Commuter Property. In both cases, the plaintiff is being taxed on the mere possibility of a sale. The analysis which ensues looks primarily at this factor in finding a violation of subsection 306(1)(d).

The posture of this case, as it now stands submitted, does not implicate questions of valuation. That issue has

not drawn a challenge from plaintiff for purposes of the litigation over the tax years now in question, since it is plaintiff's contention that the "value" of NURPEFAR should be zero. *See* Plaintiff's Trial Mem. at 5; Plaintiff's Closing Arg. at 3; Defendants' Post-Trial Br. at 9. Rather, the sole contention before the Court is one of the imposition of the tax in the first instance. Plaintiff seeks a declaratory judgment and the issuance of injunctive relief. *See* Fourth Amended Complaint at ¶ 2; 28 U.S.C. §§ 2201, 2202; 49 U.S.C. § 11503.

DISCUSSION

The statutory scheme from which the present challenge arose was enacted by Congress in part to protect the railroads of the United States, which " 'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Air Lines, Inc. v. Board of Equalization,* 107 S. Ct. 1038 (1987) (quoting S.Rep. No. 91-630, p.3 (1969)). That portion of the legislation invoked here—section 306—prohibits States and their subdivisions from enacting certain taxation schemes that discriminate against railroads. *ACF Industries,* 114 S. Ct. at 846.

Specifically, section 306(1) provides, in relevant part:

> [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment, (but only to the extent of any portion based on excessive values as hereinafter

described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

4-R Act § 306(1).

Plaintiff has brought the present challenge under subsection 301(1)(d). That provision has been found to prohibit a variety of discriminatory taxation schemes. *See, e.g., Trailer Train Co. v. Leuenberger,* 885 F.2d 415, 418 (8th Cir. 1988), *cert. denied, sub nom., Boehm v. Trailer Train Co.,* 490 U.S. 1066 (1989) ("When the exceptions apply to three-fourths of the commercial and industrial property in Nebraska and do not apply to rail cars, the tax system in Nebraska discriminates against [the railroads]."); *Burlington Northern Railroad Co. v. Bair,* 766 F.2d 1222, 1224 (8th Cir. 1985) ("[C]lassification scheme results in obvious discrimination against Burlington Northern by excluding it from the benefits of personal property tax roll-backs and credits which most

of the taxpayers enjoy."); *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

The most recent word on the scope of subsection 306(1)(d) was spoken by the Supreme Court in *ACF Industries*, 114 S. Ct. 843. Reversing a Ninth Circuit decision, the Court upheld a challenged Oregon taxation scheme, under which numerous non-railroad entities were granted exemptions from an otherwise generally applicable ad valorem tax. Significantly, however, the Court noted that under the scheme, railroads were "not . . . the only commercial entities subject to an ad valorem property tax . . . ." 114 S. Ct. at 851.

> If such a case were to arise, it might be incorrect to say that the state 'exempted' the nontaxed property. Rather, one could say that the state had singled out railroad property for discriminatory treatment. . . . On the record before us, we need not decide whether subsection [(1)(d)] would prohibit a tax of that nature.

Id. at 851-52. That decision does not affect the present analysis, given the different taxation schemes at issue. There, the Supreme Court undertook to determine whether plaintiffs were discriminated against in not receiving exemptions to an otherwise valid ad valorem tax; by contrast, the present case involves the legitimacy of a particular tax for which plaintiff was indeed "singled out". *See id.* at 851-52.

The contours of liability under subsection 306(1)(d) were specifically outlined in an earlier Order of this Court. There, the Court set forth the three elements necessary to establish discrimination under section 306 (1)(d):

(i) That the entity being discriminated against is a member of a class possessing a particular legally or legislatively defined characteristic ("the *Protected Class*");

(ii) That there is some law, act, or practice that causes *disparate treatment* of the Protected class compared to others similarly situated with respect to the purpose of the law, act or practice ("the Classification"), and most importantly;

(iii) That, as a result of the Classification, he or she has *suffered an unfair or unreasonable burden, impact or deprivation of a right.*

Order, April 19, 1993, at 7 (emphasis in original). Moreover, as defendants accurately point out, *see* Defendants' Post Trial Br. at 6, it is the plaintiff which bears the burden of proving these elements are met. *See Burlington Northern Railroad Co. v. James,* 911 F.2d 1297, 1300 (8th Cir. 1990).

An application of the facts adduced at trial to the above test yields the conclusion that defendants have imposed a discriminatory tax on plaintiff in violation of subsection 306(1)(d) with respect to both the Commuter Property and the Restructuring Plan Property.

The first element of the test is indisputably met, and defendants have acknowledged as much. Plaintiff Santa Fe, as a railroad, is a member of a "protected class" for purposes of the 4-R Act.

The second element is also met. An appropriate analysis must begin with a description of the methods of taxation involved here. Pursuant to California's Revenue and Taxation Code, the SBE identifies, classifies, assesses and values plaintiff's property. The SBE then informs counties

of the assessed valuation for such property within their boundaries, and the counties, in turn, levy and collect property taxes on the basis of the assessed values determined by the SBE. *See* Fourth Amended Complaint at ¶ 7.

Interstate Commerce Commission Accounting Rules and California law provide that, as pertains to regulated railway companies, "there shall be only two classifications of property for purposes of this code, unitary and nonunitary." Cal. Rev. & Tax. Code § 723.1. Unitary property is that property which is used for the primary function of the owner. With the exception of the select property here at issue, the SBE has determined that nonunitary property is that property completely unrelated to the operation of the railroad.

As is illustrated by its Policy Statement, however, the SBE has purposefully engaged in a practice of classifying and taxing NURPEFAR. *See* Exh. 30. Under the General Definition section of the Policy, *unitary property* is defined as "property items owned by the state assessee and used in its utility or railroad operation"; *nonunitary property* is defined as "property owned by a state assessee but not used or needed for its utility or railroad operation"; and, *NURPEFAR* is defined as "property or property rights owned by a railroad." Plaintiff's Closing Arg. at 9.

Further, under California law, absent a change in ownership (as defined in California Revenue and Taxation Code §§ 60 *et seq.*) or the completion of any new construction, the defendant counties may not reassess real property. *See* Cal. Const. Art. XIIIA; Stipulation as to Certain Facts—County Assessors at 2, Sept. 17, 1993. Rather, even in the event of a substantial intervening increase in market value of real property, an assessee

could not be taxed at a rate reflecting more than a 2% increase in an assessment each year. Plaintiff's Closing Arg, at 5-6. Using a hypothetical in which a taxed subject had a market value of $100,000, Gary Gillan, the Assistant Assessor for Los Angeles County, acknowledged that a tax could be imposed on no greater an amount than $102,000 the following year. *See Gillan* Test., R.T. at 57-58 (Oct. 5, 1993).

The parties have agreed by stipulation to the permissible scope of a county's powers in taxing real property interests. *See* Stipulation as to Certain Facts—County Assessors, Sept. 17, 1993. Defendant counties assess to the owner of real property the entire "bundle of rights" which comprises locally assessed real property together, with the exception of separately-owned leasehold improvements, mineral rights and other inchoate rights, any or all of which may be separately assessed. *Id.* at 3-4. However, defendant counties do not assess such rights until the interest is sold and they do not assess such rights separately to property owners who have not sold such rights. *Id.* at 4. Specifically, the parties agree that the defendant counties neither reassess real property based on an owner's stated intent to try and sell the property sometime in the future, nor as a result of the owner's offering the property for sale, announcing that the property is for sale, or negotiating for a sale. *See id.* at 2. Upon comparison of the above restrictions to the evidence introduced at trial, it is apparent that what is preached is not practiced.

The SBE has strayed from the above restrictions by imposing a tax upon a class of railroad property that is not imposed on other, non-railroad property. The parties have stipulated that neither the SBE nor the defendant counties has adopted specific guidelines as to how to

value the individual pieces that make up the "bundle of rights" comprising locally assessed property. Stipulation as to Certain Facts—County Assessors, Sept. 17, 1993 at 4. Pursuant to actual practice, however, when it believes an owner of rail transportation property intends to dispose of a portion of its property or has rejected an offer for the sale of certain property rights, the SBE classifies that property as NURPEFAR and imposes a tax based on the value assessed to that property. *See* Plaintiff's Closing Arg. at 3.

Specifically, plaintiff alleges in Counts One and Two of its Fourth Amended Complaint that, when the SBE believes that an owner of rail transportation property may dispose of a portion of such property, the SBE classifies such property as NURPEFAR in property class codes 891, 892 or 893, and taxes it as such. *See* Fourth Amended Complaint at ¶¶ 19, 22. The essence of the claims raised in Counts One and Two of the Fourth Amended Complaint is that defendants have discriminated against plaintiff in violation of subsection 306(1)(d) by imposing "any other tax" that results in discriminatory treatment of a common carrier subject to the 4-R Act.[4]

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[4] In the First Count, plaintiff specifically alleges the tax has been on property interests for which other similarly situated taxpayers are not taxed. *See* Fourth Amended Complaint at ¶¶ 22-24. In its Second Count, plaintiff specifically alleges that it has been subject to a double taxation violative of both section 306 and equal protection. *See* Fourth Amended Complaint at ¶¶ 25-32.

In the Third Count, plaintiff claims that an assessment has been discriminatorily imposed in violation of section 306. *See* Fourth Amended Complaint ¶¶ 33-40. The parties have agreed that the issues in Count Three would be litigated in a separate proceeding following resolution of the primary issues addressed in this case.

On December 2, 1993, plaintiff filed a Fifth Amended Complaint, repeating the same allegations contained herein, and also including a Fourth Count challenging disscriminatory assessment alleged to have been imposed in 1993.

The SBE describes property in class code 801 as non-unitary railroad *land* eligible for 4-R Act relief; property in class code 892 as non-unitary railroad *improvements* eligible for 4-R Act relief; and property in class code 893 as non-unitary railroad *personal property* eligible for 4-R Act relief. *Id.* at ¶ 20. This case relates primarily to property classified by the SBE in class codes 891 and 892. *See* Plaintiff's Trial Mem. at 2 n.1. As plaintiff underscores, according to the SBE's own definition, NURPEFAR is the only class of property which provides for the taxation of property rights; further, only property owned by railroads can be assigned to this new property class. Plaintiff's Closing Arg. at 9-10.

Defendants argue throughout that neither the SBE nor any county assesses or appraises a property based on the fact that an owner may sell the property. *See* Defendants' Post Trial Br. at 7. In support of this assertion, defendants cite only the "uncontradicted" testimony of Harold Hale, the Principal Property Appraiser for Transportation Properties at the SBE. *See id.* at 7-8. There, in response to questions whether an announcement of a restructuring plan, or an offer to purchase the property, would trigger the "immediate valuation of any property on that plan," Mr. Hale responded, "No. The property would not be valued until the next lien date." *See id.* at 8. The answer does not deny that a restructuring plan or purchase offer could be taken into account by the SBE, however, but merely states the time at which such information might be taken into account. Thus, the "uncontradicted" testimony does not foreclose the possibility that defendants have impermissibly used a rejected offer or proposed restructuring as the basis for assessing the subject property at a higher rate, and prior to a change of ownership, notwithstanding defendants' contention that neither the SBE nor any county assesses or

appraises a property based on such criteria. *See* Defendants' Post Trial Br. at 7.

Defendants further argue that the appropriate undertaking for the Court at this stage is to consider the appropriate assessment ratio to be applied to the subject property.[5] That test, according to defendants, is as follows: Board Fair Market Value × Board Ratio = County Fair Market Value × County Ratio. "If the equation is valid, if both sides are equal or within 5%, there is no violation of § 306." Defendants' Post Trial Br. at 10.

This suggestion is misplaced. The issue governing this case is not what assessment ratio should be applied to the subject property, but instead whether an imposed tax on plaintiff's property is, in itself, a discriminatory one. *See* Plaintiff's Supp. Br. at 8. Indeed, the statutory structure of § 306(1) makes this much apparent. While subsections 306(1)(a)-(c) prohibit discrimination in assessment ratios and rates of taxation, subsection 306(1)(d) speaks in more expansive terms, and prohibits "any other tax. . . ." The Ninth Circuit opinion in *ACF Industries* found such proof of disparate assessment ratios not necessary to prove a violation under subsection 306(1)(d), writing that it was "not surprising" that other courts had applied subsection (1)(d) to

> prevent other forms of discrimination in property taxes that [were] not reached by subsections (1)(a) and (1)(c) . . . . We conclude, therefore, that Sec-

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[5] Indeed, defendants argue at one point in their papers that this case actually must be analyzed not under subsection 306(1)(d), but under subsection 306(1)(a). *See* Defendants' Post Trial Br. at 14-15. As discussed above, this case does not directly implicate a challenge to matters of valuation of subject property. Rather, plaintiff's sole contention is that the SBE's creation of NURPEFAR effects a violation of subsection 306(1)(d). *See* Plaintiff's Trial Mem. at 5; Plaintiff's Closing Arg. at 3.

> tion 306(1)(d) prohibits not only discriminatory taxes other than property taxes subject to subsections (1)(a) and (1)(c) but also . . . taxation of a railroad's transportation property which discriminates in a manner other than by assessment ratio or rate.

961 F.2d 813, 820. While that decision was reversed, the reversal was on the sole basis that a state could grant exceptions to a generally applicable ad valorem property tax without subjecting the taxation of railroad property to challenge under subsection 306(d)(1) the 4-R Act. The above-quoted portion of the Ninth Circuit opinion, holding generally that subsection 306(1)(d) covers discriminatory taxes other than by assessment ratio or rate, was not called into question by the holding or analysis of the opinion for factual situations other than those implicating exemptions. *See* 114 S. Ct. at 847-50. The Ninth Circuit's discussion of the matter, which also reflects the present law of various other circuits, *see Ogilvie*, 657 F.2d at 10; *Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987), thus remains persuasive despite the decision's subsequent reversal.

Defendants argue that, even in the event plaintiff's claims are cognizable under § 306(1)(d), there is no violation of that subsection because, as "railroads are all centrally assessed there can be no identical county actions to compare." Defendants' Post Trial Br. at 17. Further, defendants argue that when counties are presented with "situations similar to the factual situation of this case, they treat them the same as does the Board." *Id.* These contentions bring the Court to the fundament of this dispute.

Defendants point to various situations "as closely comparable, in principle, to this case as they can be without

involving railroads." Defendants' Post Trial Br. at 20. First, defendants pose the scenario of placing advertisements on a building. Such placement, according to defendants, would not infringe other uses of the building, and an offer to place such advertising, if made and rejected, would be properly considered as one of the various sticks in the bundle of property rights for purposes of valuing the property as of the next assessment date. Defendants' Post Trial Br. at 20-21.

As a second example, defendants float the issue of "air rights" as properly considered within the scope of valuation determinations. *See* Defendants' Post Trial Br. at 21. Defendants cite to the trial testimony of Charles Knudsen, the Manager of Assessment Services for the SBE, who was presented with a hypothetical situation involving an offer for purchase of air rights between two commercial buildings with the aim of constructing a passageway. On the supposition that an offer was rejected, Mr. Knudsen testified that rejected offer "could" be taken into account in the assessment. Knudsen Test., R.T. at 100:5-101:25.

In a third example, defendants analogize the present, challenged practice to the taking into account of a rejected offer for purchase of transferrable development rights, *i.e.* those rights to build to specified space limits. *See* Defendants' Post Trial Br. at 22-23. Since, by definition, such rights are transferrable to owners of other properties, the purchase of the rights would increase the total value of the property to which they were added and, as a corollary, decrease the total value of the land from which they were taken. Thus, defendants argue, the transferrable development rights are part of the bundle of rights from which a local appraiser could properly consider a rejected offer as "information that ought to be considered, and perhaps given considerable weight by the ap-

praiser." Defendants' Post Trial Br. at 23; Gillan Test., R.T. at 10:3-5.

Defendants contend these examples fit tightly as analogies because each instance presents a bundle of rights in which one stick has value independent to, and can be sold without detracting from the value of, the remaining sticks. *See* Defendants' Post Trial Br. 20. The present case, as framed by defendants, similarly involves a rejected offer to buy one stick, the sale of which could not have interfered with the remainder of the business. *Id.* at 21. In sum, defendants contend on the basis of their proffered examples that "the evidence shows that there is no discrimination against plaintiff in the way in which the Board and local assessors would appraise property like the commuter lines." Defendants' Post Trial Br. at 23.

This line of argument must be rejected. As pertains to the last two examples, both transferrable development rights and air rights are interests which have been deemed cognizable and which may be accounted for in an assessment or reassessment. Gillan Test., R.T. at 16:15-17; Knudsen Test., R.T. 100:5-21. Each of these interests, importantly, would have a value independent of, and prior to, any attempted sale of the interest. Accordingly, then, in each of these examples, a completed transaction for the sale of transferrable development rights or air rights might also be taken into account as a taxable value in a reassessment. Equally important, such interests are present in various contexts and as to various assessees, unlike the isolated and therefore discriminatory use of NURPEFAR with respect only to owners of railroads.

The taxation of preexisting, cognizable interests in such forms as transferrable development rights and air rights is thus distinct from situations such as the present one,

which implicates merely an attempted but uncompleted sale of an interest which has not been deemed to have a taxable value prior to a lien date. Thus, a more accurate way of phrasing defendants' examples would be whether the *proposed* sale of air rights or transferrable development rights could trigger a reassessment. Clearly, under the existing practices by defendants, it could not. Further, this distinction plagues the first example cited by defendants, since it is unsubstantiated that defendants have ever taxed an assessee on the basis of an offer to place advertising, once made and rejected. Defendants' Post Trial Br. at 20-21. Finally, it is no answer to suggest, as defendants have, that the SBE *would* tax other assessees in a manner similar to plaintiff if the situation were to arise in the future, *see* Hale Test., R.T. 81:2-6. Such a response is purely speculative.

It is the task of the Court to decide whether defendants have in practice imposed such similar taxes on others similarly situated. Based on the evidence submitted at trial, the answer to that inquiry is a resounding "no." Upon being asked whether there were "any other state-assessed properties . . . that had their property classified . . . on the stated intent to sell the property some time in the future, or based on a failed or not completed sale negotiation," Mr. Hale responded that he was "not aware of any specific circumstance in the past." Plaintiff's Closing Arg. at 11; Plaintiff's Supp. Brief at 7 n.3; Hale Test., R.T. 67:8-15 (Sept. 28, 1993). The testimony of Mr. Knudsen is in accord. *See* Plaintiff Closing Arg. at 12-13; Knudsen Test., R.T. 106-07 (Sept. 28, 1993).

The evidence proves that no other similarly situated taxpayers have been taxed in similar manner. Neither other state assessees nor locally assessed commercial and industrial property taxpayers are classified and taxed based on the "right" to do something different with their

property in the future. Plaintiff's Closing Arg. at 11. Accordingly, the Court finds the second prong of the operative test met.

It is, finally, clear that the third part of the test governing this dispute is met. As a result of the classification, plaintiff has suffered an unfair or unreasonable burden, impact or deprivation of a right. Mr. Hale testified that plaintiff has been taxed in the manner here solely by virtue of the SBE's classification practices. *See* R.T. 66:5-8 (Sept. 28, 1993). As a result, plaintiff claims it has been assessed taxes in the amount of $3,003,098 based solely on the classification of some of its property as NURPEFAR, *see* Plaintiff's Closing Arg. at 13, a fact clearly amounting to "an unfair or unreasonable burden."

The remaining question before the Court is what remedy is properly called for upon finding a violation of subsection 306(1)(d). As discussed above, the actionable wrong committed by defendants cannot be configured as an error in computing assessment ratios. Rather, the wrong consists in the imposition of the tax in the first instance. There can accordingly be only one fitting remedy—that which would correct the wrongfully imposed tax. The appropriate remedy thus is not merely to reduce the assessment ratio, but to eliminate altogether the imposition of the discriminatory tax. The Court hereby enters a declaratory judgment that the challenged taxes effect a violation of subsection 306(1)(d). As pertains to further disputes generating from plaintiff's overpayment of taxes, and plaintiff's right to a refund of such amounts, *see* Plaintiff's Closing Arg. at 15, the parties shall attempt to resolve such matters.

CONCLUSION

For the foregoing reasons, the Court enters a declaratory judgment that defendants have violated subsection 306(1)(d) of the 4-R Act with respect to the challenges pleaded in Counts One and Two of plaintiff's Fourth Amended Complaint.[6] Plaintiff shall draft proposed findings of fact and conclusions of law consistent with this Order, for submission with the Court by July 22, 1994. Defendants may submit an opposition to those findings and conclusions by August 5, 1994.

A status conference scheduled for June 9, 1994, at 3:30 p.m. shall remain in effect.

IT IS SO ORDERED.

Dated: June 7, 1994.

/s/ D. Lowell Jensen
D. LOWELL JENSEN
United States District Judge

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[6] The Court's finding of a violation of Count Two is premised solely on subsection 306(1)(d), and not on the Equal Protection Clause.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 89-4030 DLJ

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to an Order of the Court dated June 7, 1994, plaintiff Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") submitted proposed Findings of Fact and Conclusions of Law in the above-captioned matter. Defendant State Board of Equalization of the State of California (hereinafter "SBE") elected not to respond to that submission.

The Court now enters Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Santa Fe is a Delaware corporation having its principal place of business in Schaumburg, Illinois. Santa Fe is a rail carrier providing transportation and is subject to the jurisdiction of the Interstate Commerce Commission.

2. Defendant SBE, is, and at all times relevant herein was, a political subdivision and agency of the State of California with the duty of assessing railroad property in the State of California.

3. Pursuant to California' Revenue and Taxation Code, the SBE identifies, classifies, assesses and values Santa Fe's property. It informs the defendant Counties of the assessed valuation for such property within their boundaries. In doing so, the SBE further informs the defendant Counties of the value allocated to each tax rate area code appearing upon the roll of each county. The defendant Counties, in turn, levy and collect property taxes for themselves and for each tax rate area code appearing on their rolls in accordance with the assessed values determined by the SBE.

4. The defendant Counties have sought to collect from Santa Fe ad valorem taxes on the "Subject Property" (as defined in Paragraph 12) for tax years 1989, 1990, 1991 and 1992.

5. Santa Fe has challenged the assessment and collection of ad valorem taxes against the Subject Property pursuant to Section 306(1)(a) and (d) of the Railroad Revitalization and Regulatory Reform Act at 49 U.S.C. § 11503 (hereafter "the 4-R Act). These Findings of Fact and Conclusions of Law relate only to Santa Fe's claims under Section 306(1)(d).

6. For purposes of ad valorem taxation, currently the SBE divides railroad property into three categories: uni-

tary property, non-unitary property and "Non-unitary Railroad Property Eligible for 4-R Act Relief" (hereafter referred to as "NURPEFAR").

7. The SBE has determined that unitary property is that property which is used for the primary function of the owner. All unitary property is rail transportation property within the meaning of the 4-R Act.

8. With the exception of the Subject Property, the SBE has determined that non-unitary property is that property totally unrelated to the operation of the railroad, and the SBE treats all such non-unitary property as non-rail transportation property.

9. As is illustrated by its Policy Statement, the SBE has purposefully engaged in a practice of classifying and taxing NURPEFAR. Under the general definition section of the Policy Statement, NURPEFAR is defined as "property or property rights owned by a railroad."

10. When the SBE believes that an owner of rail transportation property intends to dispose of a portion of its property or has rejected an offer for the sale of certain property rights, the SBE classifies such property as NURPEFAR and places it in property class codes 891, 892 or 893 and taxes it as such.

11. The SBE describes property in class code 891 as nonunitary railroad *land* eligible for 4-R Act relief; property in class code 892 as non-unitary railroad *improvements* eligible for 4-R Act relief; property in class code 893 as non-unitary railroad *personal property* eligible for 4-R Act relief. The class codes were formerly numbered 191, 192 and 193, respectively. When the SBE used class codes 191, 192 and 193, it identified such property as "Operating Non-Unitary Property," even though California law prohibits this classification for railroad property.

12. The property which is the subject of this action ("the Subject Property") consists of two basic categories of NURPEFAR: (1) properties which the SBE reclassified for tax years 1989 through 1992 from unitary class codes 1 and 2 to "operating non-unitary" class codes 191 and 192 (changed for 1991 and 1992 to 891 and 892), based on statements by Santa Fe's management in 1986 and/or 1989 that such properties might be "sold or abandoned" sometime in the future (hereinafter referred to as "the Restructuring Plan Property"), and (2) properties which the SBE assigned both class codes 1 and 891 to in tax year 1992, based on Santa Fe's negotiations with various southern California transit districts to sell track and/or trackage rights for commuter purposed (hereinafter referred to as "the Commuter Property").

13. For tax years 1989 through 1992, all of the Subject Property was taxed as part of Santa Fe's unitary property and again as NURPEFAR.

14. The Subject Property is the only class of property in the State of California that is taxed on the basis that it may be sold or otherwise disposed of in the future. No locally assessed properties or other state assessed properties are taxed on this basis.

15. Only Santa Fe, and other owners of rail transportation property, own property classified as NURPEFAR.

16. During tax years 1989 through 1992, the Subject Property was part of Santa Fe's integrated railway system and was operated as a unit by Santa Fe in its primary function of transporting freight for hire. Santa Fe operated trains over the Subject Property on a regular basis to transport freight.

17. Throughout tax years 1989 and 1992, Santa Fe continued to operate the Commuter Property as a part

of its operating unit in its primary function of transporting freight for hire.

18. The Commuter Property was then assigned an additional Class Code of 891 in tax year 1992.

19. Prior to the lien dates on which the SBE assigned an additional Class Code of 891 to Commuter Property, such property had not been sold.

20. As of January 1, 1992, Santa Fe had not sold any of the Commuter Property and prior to the 1992 assessment, the SBE had assigned no value to this interest.

21. By the time of the 1992 assessment date, however, the SBE was informed that a consortium of counties had offered to buy the right to run commuter trains over the Commuter Property and that the offer was refused.

22. The SBE set the value of Santa Fe's Commuter Property for tax year 1992 at $300,000,000, based on the offer which Santa Fe had refused.

23. With respect to the Restructuring Plan Property, in 1986, Santa Fe's chairman of the board announced that Santa Fe intended to dispose of approximately 3,100 miles of track over a period of five years in an effort to improve Santa Fe's financial condition.

24. The Restructuring Plan Property would be disposed of by offering it for sale or filing applications with the ICC to abandon railroad operations on these segments of the railway system.

25. Only a small portion of the Restructuring Plan Property—approximately 337 miles of track—was located within the State of California.

26. By 1989, Santa Fe announced a revised Restructuring Plan which also called for disposing of approxi-

mately 3,100 miles of track—with approximately 366 miles in California, some of which was the same track identified in the 1986 plan.

27. Prior to the lien dates on which the SBE reclassified the Restructuring Plan Property as Class Codes 891, 892 or 893, none of that property had been sold.

28. As of January 1, 1992, Santa Fe had disposed of three miles of the California track identified in the 1986 Restructuring Plan and 154 miles of the California track identified in the 1989 Restructuring Plan.

29. Defendants used a list of properties to be disposed of in Santa Fe's 1986 and/or 1989 Restructuring Plans as a basis for establishing a new value for those properties.

30. This value was then added to the total value of Santa Fe, and thus taxed for tax years 1989 through 1992.

31. Defendant Counties assess all real property, including virtually all locally-assessed commercial and industrial real property, based on its fair market value as of March 1, 1975. In accordance with Proposition 13, Article XIIIA of the California Constitution, defendant Counties only reassess real property: (1) as of the date of a "change in ownership" (as defined in California Revenue and Taxation Code §§ 60, *et seq.*) of the real property after March 1, 1975; or (2) as of the date of completion of any new construction which occurred after March 1, 1975; or (3) if the current fair market value of the property has declined from the amount determined in accordance with the above rules.

32. Defendant Counties do not reassess real property based upon the owner's stated intent to try to sell the property sometime in the future. This does not constitute a change in ownership as defined under California law.

33. Defendant Counties do not reassess real property as a result of the owner's offering the property for sale, announcing that the property is for sale, or negotiating for a sale, because such property cannot be reassessed unless and until there is a change in ownership as defined under California law.

34. Defendant Counties do not reassess real property which is offered for sale as a result of the owner receiving an offer to purchase such property when the offer is rejected by the owner. This does not constitute a change in ownership as defined under California law.

35. With the exception of taxable possessory interests, as defined in California Revenue and Taxation Code §§ 107 *et seq.*, defendant Counties do not reassess real property when the owner of such property enters into a licensing agreement or lease which will allow another person to use the property for a term shorter than 35 years. This does not constitute a change in ownership as defined under California law.

36. Defendant Counties do not reassess real property as a result of increased intensity in the use of such property by the owner or as a result of the increased use of that property by a different person or entity. This does not constitute a change in ownership as defined under California law.

37. Defendant Counties do not reassess real property if the owner of the property leases or rents the property for use at times when the owner is not using it or for a use different than what the owner uses the property for during his use of the property provided that the lease which authorizes such use is for a term shorter than 35 years. This does not constitute a change in ownership as defined under California law.

38. When real property or property rights are sold in California, any property taxes assessed after the sale occurs are not assessed to the seller of the real property or property rights.

39. Defendant Counties assess to the owner of real property the entire "bundle of rights" which comprises locally assessed real property together, with the exception of separately-owned leasehold improvements, mineral rights and other inchoate rights, any or all of which may be separately assessed; however, defendant Counties do not assess such rights separately ot property owners who have not sold such rights.

40. Neither the SBE nor the defendant Counties has adopted specific guidelines as to how to value the individual pieces that make up the "bundle of rights" comprising locally assessed property.

41. Santa Fe, as a railroad, is a member of a "protected class" for purposes of the 4-R Act, and defendants concede this fact.

42. According to the SBE's own definition, NURPEFAR is the only class of property which provides for the taxation of property "rights"; further, only property owned by a railroad can be assigned to this new property class.

43. Defendants have used a rejected purchase offer for the Commuter Property and Santa Fe's announcements about the proposed sale or abandonment of track in its 1986 and/or 1989 Restructuring Plans as the basis for assessing the Subject Property. Defendants have done so prior to any change in ownership and notwithstanding their concessions that neither the SBE nor any county assesses any other California property based on such criteria.

44. Defendants have imposed a tax upon a class of Santa Fe's railroad property that is not imposed on other, non-railroad property.

45. The evidence proves that no other similarly situated taxpayers have been taxed in a manner similar to Santa Fe or other railroads. Neither other state assesses nor locally assessed commercial and industrial property taxpayers are classified and taxed based on the unexercised "right" to sell or do something different with their property in the future.

46. As a result of the classification of its property as NURPEFAR, Santa Fe has suffered an unfair or unreasonable burden, impact or deprivation of a right.

47. The evidence establishes that Santa Fe has been taxed in the manner at issue solely by virtue of the SBE's classification practices, and that as a result, Santa Fe has been forced to pay taxes in the amount of $3,003,098 based solely upon the classification of some of its property as NURPEFAR, a fact clearly amounting to "an unfair or unreasonable burden."

48. Defendants' taxation of the Subject Property based on the SBE's classification of it as NURPEFAR or Operating Non-Unitary Property results in discriminatory treatment of Santa Fe.

CONCLUSIONS OF LAW

1. This action does not implicate questions of valuation; rather, the sole contention before the Court is one of the imposition of the tax on the Subject Property in the first instance.

2. Specifically, the issue is whether the imposition of this tax violates Section 306(1)(d) of the 4-R Act. The Court finds that it does.

3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 as well as 39 U.S.C. § 11503.

4. Congress enacted Section 306(1)(d) of the 4-R Act in part to protect the railroads of the United States, which " 'are easy prey for state and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Airlines, Inc. v. Board of Equalization*, 107 S. Ct. 1038 (1987) (*quoting* S. Rep. No. 91-630, p.3 (1969)).

5. Section 306 of the 4-R Act prohibits states and their political subdivisions from enacting certain taxation schemes that discriminate against railroads.

6. Specifically, Section 306(1) provides, in relevant part:

> [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, political subdivision of the State or governmental entity or person acting on behalf of such state or subdivision to commit any of the following prohibited acts: . . .
>
> * * * *
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroads subject to this part.

7. Santa Fe has brought this action under Section 306(1)(d). This provision has been found to prohibit a variety of discriminatory taxation schemes, including instances where, as here, railroad property has been "singled out" for discriminatory taxation. *Department of Revenue of Oregon v. ACF Industries*, 114 S. Ct. 843 (January 24, 1994).

8. The three elements necessary to establish discrimination under Section 306(1)(d) are:

> (i) That the entity being discriminated against is a member of a class possessing a particular legally or legislatively defined characteristic ("the *Protected Class*");
>
> (ii) That there is some law, act or practice that causes *disparate treatment* of the Protected Class compared to others similarly situated with respect to the purpose of the law, act or practice ("the Classification"), and most importantly;
>
> (iii) That, as a result of the Classification, he or she has *suffered an unfair or unreasonable burden, impact or deprivation of a right.*

9. Santa Fe has met its burden of proving these elements are met in this case with respect to both the Commuter Property and the Restructuring Plan Property.

10. California law provides that, as pertains to regulated railway companies, "there shall be only two classifications of property for purposes of this code, unitary and non-unitary." Cal. Rev. & Tax Code § 723.1. California law does not recognize or permit the classification of property the SBE has labelled NURPEFAR.

11. The Court rejects defendants' argument that the appropriate undertaking for the Court at this state is to consider the appropriate assessment ratio to be applied to the Subject Property. The issue governing this case is not what assessment ratio should be applied to the Subject Property, but instead whether the tax imposed on Santa Fe's property is, in itself, a discriminatory one.

12. While subsections 306(1)(a) through (c) prohibit discrimination in assessment ratios and rates of tax-

ation, subsection 306(1)(d) speaks in more expansive terms, and prohibits "any other tax . . ." which discriminates against common rail carriers.

13. The Court finds that defendants have discriminated against Santa Fe in violation of subsection 306(1)(d) by imposing "any other tax" that results in discriminatory treatment of a common carrier subject to the 4-R Act.

14. Defendants are hereby permanently enjoined from collecting or seeking to collect any taxes on the Subject Property for tax years 1989 through 1992.

15. Defendants are hereby ordered to pay Santa Fe a refund of $3,003,098.00 for taxes paid on the Subject Property for tax years 1989 through 1992, plus interest at the rate of nine percent (9%) per annum from the dates the taxes were paid until refunded, or to allow Santa Fe a credit against future property tax payments in the amount of $3,003,098.00, together with interest at the rate of nine percent (9%) per annum from the dates the taxes were paid until fully credited.

16. In addition to the claims addressed herein, Santa Fe has brought similar claims for the 1993 tax year. While the Court will resolve those issues at a later date, the same legal principles set forth herein will apply to the resolution of those claims.

IT IS SO ORDERED.

DATED: September 7, 1994

/s/ D. Lowell Jensen
D. LOWELL JENSEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Master Consolidated
Number C 81-4365 DLJ

No. C 89-4030 DLJ

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

PARTIAL JUDGMENT

Plaintiff, the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") has challenged the assessment and collection of ad valorem taxes against its property pursuant to Sections 306(1)(a) and (d) of the Railroad Revitalization and Regulatory Reform Act at 49 U.S.C. § 11503 hereinafter "the 4-R Act"). The Court held a trial concerning only Santa Fe's claims under subsection 306(1)(d) of the 4-R Act for tax years 1989 through 1992. The Court found that defendants discriminated against Santa Fe in violation of subsection 306(1)(d) by imposing a tax that results in discriminatory treatment of Santa Fe.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Court's Findings of Fact and Conclusions of Law relating to the trial of Santa Fe's claims under subsection 306(1)(d) of the 4-R Act are incorporated herein as part of this Partial Judgment by this reference.

2. Defendants have discriminated against Santa Fe in violation of subsection 306(1)(d) of the 4-R Act by imposing a tax that results in discriminatory treatment of Santa Fe.

3. Defendants are permanently enjoined from collecting or seeking to collect any taxes on the Subject Property as defined in the Court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992.

4. Defendants shall pay Santa Fe a refund of $3,003,098 for the taxes paid on the Subject Property for tax years 1989 through 1992, plus interest at the rate of 9% per annum from the dates the taxes were paid until refunded; alternatively, defendants shall grant Santa Fe a credit against future property tax payments in the amount of $3,003,098, together with interest, at the rate of 9% per annum from the dates the taxes were paid until fully credited. Defendants shall notify Santa Fe within 30 days of entry of this Partial Judgment whether they intend to issue to Santa Fe the refund or grant the credit described above.

5. This Partial Judgment does not resolve any of Santa Fe's claims relating to tax year 1993 nor does it resolve Santa Fe's claims brought pursuant to subsection 306(1)(a) of the 4-R Act for tax years 1989 through 1992.

6. In accordance with Rule 54(b), Federal Rules of Civil Procedure, the Court hereby expressly determines

that there is no just reason for delay and directs the entry of judgment as set forth herein.

DONE IN OPEN COURT this 12th day of September, 1994

/s/ D. Lowell Jensen
D. LOWELL JENSEN
United States District Court

Supreme Court, U.S.
FILED
MAY 11 1999
CLERK

No. 98-1448

(4)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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2488

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE COURT BELOW DID NOT HAVE JURISDICTION TO ENTERTAIN SANTA FE'S SUMMARY JUDGMENT MOTIONS	1
II. A REMEDY UNDER THE DOCTRINE OF *EX PARTE YOUNG* IS NOT AVAILABLE TO SANTA FE AGAINST THE INDIVIDUAL BOARD MEMBERS BECAUSE IT DOES NOT SEEK PROSPECTIVE RELIEF	8
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Cases	
Agostini, et al. v. Felton 521 U.S 203 (1997)	6
Coeur d'Alene Tribe of Idaho v. Idaho 521 U.S. 261 (1997)	9
Commissioner v. Sunnen 333 U.S. 591, 598 (1948)	6
Ex Parte Young 209 U.S. 123 (1909)	8, 9
Frommhagen v. Board of Supervisors 197 Cal.App.3d 1291, 1300 (1987)	6
Harper v. Virginia Department of Taxation 509 U.S. 86, 96-97 (1993)	7
Matek v. Murat 862 F.2d 720, 724 n. 1 (9th Cir.1988)	6
Montana v. U.S. 440 U.S. 147, 158 (1979)	6
Oregon Short Line Railroad Co. v. Department of Revenue, Oregon 139 F.2d 1259 (9th Cir. 1998)	6, 7
Russell v. United States 592 F.2d 1069, 1071 (9th Cir. 1979)	6

TABLE OF AUTHORITIES, CONT'D

Seminole Tribe of Florida v. Florida
517 U.S. 44 (1996) 1, 2, 5, 6, 7

State Bd. of Equal., Calif. v.
So. Pacific Transp. Co., et al.
No. 98-584 8

Statutes

49 U.S.C.
§ 11501 1, 2, 9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
No. 98-1448

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, *Respondent*.

ARGUMENT

I.

THE COURT BELOW DID NOT HAVE JURISDICTION TO ENTERTAIN SANTA FE'S SUMMARY JUDGMENT MOTIONS

In its order issued October 28, 1997, the U.S. District Court for the Northern District of California determined that, in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), it was divested of subject matter jurisdiction to hear claims of discrimination pursuant to section 306 of the Railroad Revitalization and Regulatory Reform Act (hereinafter the "4-R Act"), 49 U.S.C. section 11501. Despite the district court's determination, that court then granted the summary judgment motions of plaintiff Atchison, Topeka & Santa Fe Railway Co., the corporate predecessor of the Burlington Northern & Santa Fe Railway Co. (hereinafter "Santa Fe") for the 1991 and 1993 tax years on the basis that a final order and judgment already had been entered

with respect to assessments for 1989 through 1992, and because the stipulated injunction with respect to the 1993 tax year became final when the Ninth Circuit Court of Appeals dismissed the appeal of the State Board of Equalization (hereinafter the "Board") in Case No. 95-15999. Appendix To Petition For Writ Of *Certiorari* (hereinafter "Pet. App.") B, pp. 28-29. In its opposition to the petition for *certiorari*, Santa Fe argues that, in this context, the retroactive application of the *Seminole Tribe* decision would be inappropriate. However, as discussed below, the record in this case establishes that no final order or judgment as to the 1991 escape assessment for the value of Commuter Property or the assessment for the 1993 tax year was entered prior to this Court's decision in *Seminole Tribe*. These are the only assessments now at issue before this Court.

In 1993, the district court presided over a trial regarding allegations that the Board had violated section 306(1)(d) of the 4-R Act. Following the trial, but prior to entry of judgment, the court added the 1993 tax year to this case by a stipulated order of preliminary injunction. The preliminary injunction states in pertinent part that the provisions of the injunction were to remain in place "pending the determination of this action, or further order of this Court". See Appendix to Respondent's Brief in Opposition (hereinafter "Resp. App.") p. 2a.

The district court subsequently issued its findings regarding the 1989 through 1992 tax years that the Board and the defendant counties discriminated against Santa Fe in violation of section 306(1)(d). The district court's Order and Findings of Fact and Conclusions of Law were filed June 7, 1994, and September 7, 1994, respectively. These findings defined the Commuter Property at issue as follows:

> "[P]roperties which the SBE assigned both class codes 1 and 891 to *in tax year 1992*, based on Santa Fe's negotiations with various southern

> California transit districts to sell track and/or trackage rights for commuter purposes (hereinafter referred to as 'the *Commuter Property*'). Resp. App. p. 30a; emphasis added.

In addition, the findings state that, although Santa Fe has similar claims relating to the 1993 tax year, "the Court will resolve those issues at a later date" using the same legal principles as set forth therein. Resp. App. p. 38a.

On September 12, 1994, the proposed Partial Judgment submitted by Santa Fe to the Court was signed and filed. Resp. App. p. 39a. The defendants were thereby "permanently enjoined from collecting or seeking to collect any taxes on the Subject Property *as defined in the Court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992*". Resp. App. p. 40a; emphasis added. Consistent with the district court's findings, the judgment further provided that it does not resolve any of Santa Fe's claims relating to the 1993 tax year. Resp. App. p. 40a. (The amount set forth in the judgment was incorrect, and, after the correct amount of refund was determined, the Modified Partial Judgment was filed on April 24, 1995.)

On May 23, 1995, the Board filed its notice of appeal to the Ninth Circuit Court of Appeals, Case No. 95-15999, which was addressed only to the second category of property, the Commuter Property. According to the district court's findings and judgment, the Commuter Property was at issue only for the 1992 tax year. Resp. App. pp. 30a, 40a.

On June 29, 1995, the Board adopted a non-unitary escape assessment for Commuter Property for 1991 and sent a notice to that effect to Santa Fe. Consistent with the district court's judgment, the notice provided that no county would collect or seek to collect any tax based on the escape assessment pending the outcome of the Board's appeal in Case No. 95-15999. Pet. App. E, p. 3.

On October 5, 1995, Santa Fe filed a *new* complaint in the district court, Case No. C 95-3532 DLJ, alleging *inter alia* that the escape assessment for 1991 results in discriminatory treatment and constitutes an improper classification. Santa Fe also filed a motion for an order directing the Board to show cause why it should not be held in contempt for issuing an escape assessment that Santa Fe contended was in violation of the Court's orders. In particular, Santa Fe claimed that the Board violated the above-referenced judgments because the Board was "permanently enjoined" from "collecting or seeking to collect any taxes on the Subject Property as defined in the Court's Findings and Conclusions of Law for tax years 1989 through 1992". However, in denying the contempt motion, the district court held that the assessment was not in direct violation of the judgment. Pet. App. E. In reaching its decision, the district court stated:

> "According to the Court's definition of the "Subject Property" in its Findings of Fact and Conclusions of Law, the only Commuter Property to which the judgment applied was . . . in tax year 1992, ... However, the Court's injunction applied to the taxes on such property for tax years 1989 through 1992. Since it is unclear whether the Court's order applies to assessments on Santa Fe's class 891 Commuter Property for tax years 1989 through 1992 or just for tax year 1992, the Court shall not base its decision on this argument. Nonetheless, the Court finds insufficient grounds for contempt based on defendants' other arguments" Pet. App. E, pp. 8-9.

On March 27, 1996, after all briefs were submitted in the Board's appeal to the Ninth Circuit Court of Appeals, this Court issued its decision in *Seminole Tribe*. The decision was brought to the attention of the Ninth Circuit, and that court directed the parties to be prepared to

discuss the implications of the decision at oral argument. However, the Ninth Circuit's opinion did not address the issue raised by *Seminole Tribe*, nor did it reach the merits of the case. Instead, in a decision issued January 6, 1997, the Ninth Circuit held that the Board's appeal was untimely.

In its opposition to the current petition, Santa Fe argues that the district court's "prior judgments regarding the 1991 and 1993 tax years became final when entered on September 12, 1994". Respondent's Brief in Opposition p. 8. However, as the above facts from the record demonstrate, no such prior judgments exist concerning the tax assessments here at issue. The validity of those assessments was not finally determined by the district court before a July 18, 1997, hearing on the Board's motion to dismiss.

Santa Fe filed its complaint regarding the 1991 escape assessment for Commuter Property, in Case No. C 95-3532 DLJ, on October 5, 1995. The Partial Judgment and Modified Partial Judgment relating to the 1994 trial of the 1989 through 1992 tax years refers to definitions set forth in its Findings of Fact and Conclusions of Law that specifically state that the only Commuter Property covered by the Court's ruling was in the 1992 tax year. Thus, prior to the July 18, 1997, hearing on the Board's dismissal motion, there was no judgment on the merits regarding the escape assessment for Commuter Property in the 1991 tax year. If there had been such a judgment, the complaint and judgment in Case No. C 95-3532 (Pet. App. B, p. 31) would have been unnecessary.

In addition, the preliminary injunction regarding the 1993 tax year did not automatically become permanent when the Ninth Circuit dismissed the Board's appeal or at any time prior to the July 18 hearing. Rather, the 1994 Partial Judgment and 1995 Modified Partial Judgment specifically provide that they do "not resolve any of Santa

Fe's claim relating to the tax year 1993". Resp. App. p. 40a.[1/]

Thus no final judgment regarding Commuter Property for 1991 and the assessment for 1993 had been entered prior to this Court's decision in the *Seminole Tribe* case. In determining the Board's motion in 1997, the district court was free, and required, to consider its subject matter jurisdiction over Santa Fe's claims for those years.

The Ninth Circuit's summary affirmance which is the subject of the pending petition apparently was based solely upon the Ninth Circuit's substantive holding, in *Oregon Sort Line Railroad Co. v. Department of Revenue, Oregon*, 139 F.2d 1259 (9th Cir. 1998), that the *Seminole* decision does not apply to restrict federal court jurisdiction in 4-R

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1. The Board notes that *res judicata* could not be applied to the 1991 escape assessment or the 1993 assessment in order to resolve Santa Fe's claims regarding those assessments. The property tax at issue is levied on an annual basis and, consequently, each year is the origin of a new liability and of a separate cause of action. (*Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948); *Russell v. United States*, 592 F.2d 1069, 1071 (9th Cir. 1979); *Frommhagen v. Board of Supervisors*, 197 Cal.App.3d 1291, 1300 (1987). Thus, if a claim regarding a particular tax year is litigated, a judgment on the merits is *res judicata* only as to any subsequent proceeding involving the same claim *and the same tax year. Id.* That is not what has happened here. Moreover, collateral estoppel and the doctrine of law of the case also are not applicable here because this Court's decision in *Seminole Tribe* constituted a significant change in the controlling case law. See, *Agostini, et al. v. Felton*, 521 U.S 203 (1997); *Montana v. U.S.*, 440 U.S. 147, 158 (1979); *Commissioner v. Sunnen, supra*, 333 U.S. at 606; *Matek v. Murat* 862 F.2d 720, 724 n. 1 (9th Cir.1988) [One ground that justifies reconsideration of the law of the case is an intervening change of controlling law].

Act cases. Santa Fe's motion for summary affirmance was based solely upon that substantive holding in *Oregon Short Line*. However, *Oregon Short Line* also contains a preliminary ruling, consistent with this Court's holding in *Harper v. Virgina Department of Transportation*, 509 U.S. 86, 96-97 (1993), that the *Seminole* decision had full retroactive effect as to all cases which were not yet final. 139 F.3d at 1265. In this context the Ninth Circuit's summary affirmance as to the judgment in favor of the Santa Fe should be treated as a holding that, even if the district court were wrong as to the pre-*Seminole* finality of any determinations concerning the assessments here at issue, summary affirmance was appropriate under the substantive *Oregon Short Line* rule that *Seminole* does not apply to 4-R Act cases.

II.

A REMEDY UNDER THE DOCTRINE OF *EX PARTE YOUNG* IS NOT AVAILABLE TO SANTA FE AGAINST THE INDIVIDUAL BOARD MEMBERS BECAUSE PROSPECTIVE INJUNCTIVE RELIEF IS NOT AVAILABLE

In its opposition to the petition for *certiorari* Santa Fe argues that granting the relief requested would not end this litigation. Resp. Br. pp. 10-11. Santa Fe argues it would still be entitled to receive prospective injunctive relief against the individual Board members in their capacities as state officials under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1909).[2/] However, as the district court found below, there are no continuing acts of the Board to be enjoined with respect to 1991 and 1993. Pet. App. B, pp. 23-24. Under California law, the assessments at issue are final and became final prior to the district court's entry of preliminary injunctions for those years. Pet. App. B, pp. 23-24. Thus, the district court found that Santa Fe was in fact seeking retroactive relief against the Board and denied Santa Fe's motions to amend its complaints to include a cause of action against

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2. As this Court is aware, the Board has another petition pending before it regarding the same issue as presented here. *State Bd. of Equal., Calif. v. So. Pacific Transp. Co., et al.*, No. 98-584. In its opposition to that petition, the Southern Pacific Transportation Company makes the same argument. Brief in Opposition pp. 5-7. However, as discussed herein, the *Ex Parte Young* doctrine is inapplicable, and the relief sought by the Board's petitions for *certiorari* would end the railroads' litigation in federal court.

the individual Board members. In the absence of any continuing act of the Board to enjoin, the *Ex Parte Young* doctrine could not be used to continue this litigation in federal court.

Even if there were ongoing acts of the Board against which injunctive relief could be sought, the district court found that Santa Fe and the other plaintiff railroads should not be allowed to use the fiction of *Ex Parte Young*. Citing *Coeur d'Alene Tribe of Idaho v. Idaho*, 521 U.S. 261, 274-278 (1997), the district court made the following determination:

> "The Court finds that California's power to assess property in the manner it deems appropriate would be impacted severely if the Court were to allow plaintiffs to proceed with this case under the fiction of *Ex Parte Young*. In addition, the Court finds the power to tax at issue here is every bit as central to state sovereignty as Idaho's interest in the submerged lands in question in *Coeur d'Alene*. Consequently, the Court finds that the nature of the present case is such that a federal court should not involve itself in a challenge to state administrative action. *Cf. Coeur d'Alene*, 117 S.Ct at 2037-38. Accordingly, the Courts holds that plaintiffs may not maintain the present suit against the individual members of the Board under *Ex Parte Young*. Pet. App. p. 22; footnote omitted.

Thus, contrary to its arguments, Santa Fe would not be able to obtain complete relief in this case in federal court notwithstanding a decision by this Court that the Board has Eleventh Amendment immunity from suits filed pursuant to the 4-R Act. Granting the relief sought by the Board's petition for *certiorari* would indeed end this litigation in federal court.

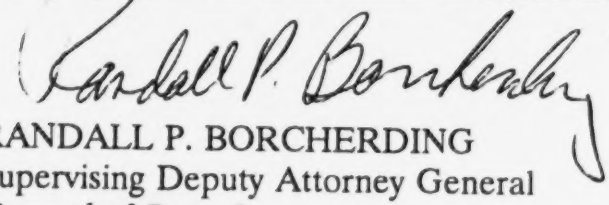
CONCLUSION

For the reasons given above, the Board respectfully asks that the petition for *certiorari* be granted.

Dated: May 11, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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APPENDIX E

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Delaware corporation,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

No. C-95-3532 DLJ

ORDER

On February 21, 1996, the court heard argument on plaintiff's motion for an order to show cause why defendants should not be held in contempt. Paul J. Mooney of Fennemore Craig, P.C. appeared on behalf of plaintiff; Marguerite C. Stricklin of the California Attorney General's Office appeared for defendants. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES plaintiff's motion.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiff, The Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") originally filed a suit against the California State Board of Equalization ("SBE") and several California Counties, challenging the assessment and collection of ad valorem taxes against its property pursuant to Sections 306(1) (a) and (d) of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 ("the 4-R Act). The Court held a bench trial on only Santa Fe's claims under subsection 306(1) (d) of the 4-R Act for tax years 1989 through 1992. The Court concluded that defendants had discriminated against Santa Fe in violation of subsection 306(1) (d) by imposing a tax that results in discriminatory treatment of Santa Fe. In particular, the Court found that the SBE's categorization of "Non-unitary Railroad Property Eligible for 4-R Act Relief" ('NURPEFAR") was discriminatory, because such property is the only class of property in the State of California that is taxed on the basis that it may be sold or otherwise disposed of in the future. See September 7, 1994, Findings of Fact and Conclusions of Law at ¶ 14.

On September 12, 1994, the Court issued a Partial Judgment, and on April 24, 1995, it issued a Modified Partial Judgment, permanently enjoining defendants "from collecting or seeking to collect any taxes on the Subject Property as defined in the Court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992." September 12, 1994, Partial Judgment at 2:14-17; April 24, 1995, Modified Partial Judgment at 2:22-24. The Findings of Fact and Conclusions of Law defined the subject property as two categories of NURPEFAR:

> (1) properties which the SBE reclassified for tax years 1989 through 1992 from unitary class codes 1 and 2 to "operating non-unitary" class codes 191 and 192 (changed for 1991 and 1992 to 891 and 892), based on statements by Santa Fe's

> management in 1986 and/or 1989 that such properties might be "sold or abandoned" sometime in future (hereinafter referred to as "the Restructuring Plan Property"); and (2) properties which the SBE assigned both class codes 1 and 891 to in tax year 1992, based on Santa Fe's negotiations with various southern California transit districts to sell track and/or trackage rights for commuter purpose[s] [hereinafter referred to as "Commuter Property"].

September 7, 1994, Findings of Fact and Conclusions of Law at ¶ 12.

In addition, the Court ordered defendants to pay Santa Fe a refund of $856,917 for the taxes paid on the Subject Property for the relevant tax years, or in the alternative to grant Santa Fe a credit against future tax payments in that amount. See April 24, 1995, Modified Partial Judgment at 2-3.

On June 29, 1995, the SBE sent Santa Fe a "Notice of Escape Assessment" concerning Santa Fe's class 891 property for tax year 1991. The notice informed Santa Fe that the SBE had adopted nonunitary escape assessments for 1991 on Santa Fe's 891 property in the amount of $234,000,000. The notice added that the escape assessment was made in conformity with the Court's April 24, 1995, Modified Partial Judgment and that the county would not collect or seek to collect any tax based on the escape assessment pending the outcome of the Board's appeal to the Ninth Circuit.

On October 4, 1995, Santa Fe filed the complaint in this action, alleging, inter alia, that the escape assessment for 1991 constituted discriminatory treatment and an improper classification. Thereafter, on October 30, 1995, Santa Fe

filed this motion for an order to show cause why defendants should not be held in contempt. Santa Fe argues that the SBE's escape assessment for 1991 is in direct violation of this Court's orders precluding defendants from collecting or seeking to collect any taxes on Santa Fe's 891 property for 1991.

B. Legal Standard

Federal courts possess the inherent authority to enforce compliance with their orders. Gompers v. Buck's Stove & Range Co., 31 S. Ct. 492, 501 (1911); Gifford v. Heckler, 741 F.2d 263, 265 (9th Cir. 1984); see 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2960, at 581-81 (1973 & Supp. 1991) [hereinafter "Wright & Miller"]. The power to hold a person in contempt is delineated by statute:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority; and none other, as--
> . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401; see also U.S. v. Barnett, 84 S.Ct. 984, 987-88 (1964) (noting that contempt power was first codified in Judiciary Act of 1789). The Court has wide latitude in determining whether a party has acted in contempt of its orders. Gifford v. Heckler, 741 F.2d 263, 266 (9th Cir. 1984) (citing Neebars, Inc. v. Long Bar Grinding, Inc., 438 F.2d 47, 48 (9th Cir. 1971)).

The civil contempt power exists to permit the Court to deal with two situations. First, it allows the Court to coerce an intransigent party to comply with Court orders. Second, the Court may use its civil contempt power to force a disobedient party to compensate innocent parties for the

damages caused by its noncompliance with the Court's orders. General Signal Corp. v. Donallco Co., Inc., 787 F.2d 1376, 1380 (9th Cir. 1986) (citing cases); Shuffler v. Heritage Bank, 720 F.2d 1141, 1147 (9th Cir. 1983); see 11 Wright & Miller, § 2960, at 584. Punitive sanctions are imposed on noncomplying parties only in exercise of the criminal contempt power. Gompers, 31 S.Ct. at 498; Portland Feminist Women's Health Center v. Advocates for Life, 877 F.2d 787, 788 (9th Cir. 1989).

There are three basic elements necessary for a prima facie showing of civil contempt. First, there must be a valid Court order that is clear in its commands. Balla v. Idaho State Board of Corrections, 869 F.2d 461, 465 (9th Cir. 1989) (court order must be "specific and definite"). Second, there must be actual notice to the parties of the terms of the order. Fed. R. Civ. P. 65(d). Third, the party must have violated the order. General Signal Corp. 787 F.2d at 1379; U.S. v. Rylander, 656 F.2d 1313, 1318 (9th Cir. 1981), rev'd on other grounds, 103 S.Ct. 1548 (1983). There is no requirement that a violation be willful. U.S. v. Laurins, 857 F.2d 529, 534 (9th Cir. 1988); Perry v. O'Donnell, 759 F.2d 1985) (comparing civil contempt to criminal contempt, where specific intent is required); Donovan v. Mazzola, 716 F.2d 1226, 1240 (9th Cir. 1983) ("Intent is not an issue in civil contempt proceedings. The sole question is whether a party complied with the district court's order.") (citations omitted).

There are two primary defenses to a charge of civil contempt. First, a party may demonstrate that it is unable to comply with the court order. Rylander, 656 F.2d at 1317, rev'd on other grounds, 103 S.Ct. 1548 (1983); Sekaquaptewa, 544 F.2d at 404. This is not a favored defense; inability to comply must be proven "categorically and in detail." Donovan, 716 F.2d at 1240 (quoting Rylander, 656 F.2d at 1313).

Second, a party may demonstrate that it is in substantial compliance. Balla, 869 F.2d at 466 ("Substantial compliance with a court order is a defense to an action for civil contempt."); National Advertising Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988); General Signal Corp., 787 F.2d at 1379 (citing cases); Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 891 (9th Cir. 1982) (citing many cases). As part of a showing of substantial compliance, the defending party must prove that it has taken "all reasonable steps" necessary to comply with the order. Balla, 869 F.2d at 466; In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987); Gifford v. Heckler, 741 F.2d 263, 265 (9th Cir. 1984) (citing Shuffler, 720 F.2d at 1146-47, and Sekaquaptewa v. MacDonald, 544 F.2d 396, 404 (9th Cir. 1976)). These steps include reasonable inspections to ensure that a party's agents and associates are complying with the court order. See Sekaquaptewa, 544 F.2d at 404 (holding that failure to inspect constituted evidence of violation). "[T]echnical or inadvertent violations of the order will not support a finding of civil contempt." General Signal Corp., 787 F.2d at 1379. Demonstrating that a party did not take all reasonable steps is part of the prima facie case. See Gifford, 741 F.2d at 265 (equating violation of court order with failure to take all reasonable steps necessary to ensure compliance).

The party seeking a finding of civil contempt has the burden of proving a prima facie case. Rylander, 656 F.2d at 1318, rev'd on other grounds, 103 S.Ct. 1548 (1983). The prosecuting party must present clear and convincing evidence that the defending party had notice of the court order and that the order was violated. Id.; Vertex, 689 F.2d at 889 (noting that this is higher standard than usual preponderance of evidence standard used in most civil cases); 11 Wright & Miller, § 2960, at 591. Once a prima facie case has been established, the burden of proof shifts to the defending party to establish any defenses it might raise.

See, e.g., Donovan, 716 F.2d at 1240 (considering inability to comply defense). The burden primarily consists of a burden to produce evidence supporting the defense. Once "detailed evidence" has produced, the burden of persuasion on these defenses shifts back to the prosecuting party. Rylander, 656 F.2d at 1318 (citing and analogizing to Title VII cases).

II. ARGUMENTS

Santa Fe argues that defendants should be held in contempt on three grounds: (1) because the escape assessment is in direct violation of this Court's order; (2) because the principles of res judicata prohibit the SBE from imposing the escape assessment; and (3) because the SBE failed to bring the escape assessment as a compulsory counter claim and is therefore precluded from asserting it now. Only plaintiff's first argument could possibly justify an order of contempt; therefore, the Court shall limit its discussion to the issue of whether the escape assessment violates this Court's prior orders.

When a court issues an order, that decision must be respected and obeyed "'until [it] is reversed for error by orderly review, either by itself or by a higher court.'" Celotex Corp. v. Edwards, ___ U.S. ___, 115 S.Ct. 1493, 1501 (1995) (quoting Walker v. Birmingham, 388 U.S. 307, 314 (1967)). This Court clearly enjoined defendants from collecting or seeking to collect any taxes for tax years 1989 through 1992 on property owned by Santa Fe that was the subject property of the litigation. See September 7, 1994, Findings of Fact and Conclusions of Law at 13:20-22; September 14, 1994, Partial Judgment at 2:14-17; April 24, 1995, Modified Partial Judgment at 2:22-24. It is undisputed that the injunction was a clear and valid order of the Court and that the parties had actual notice of the order. Thus, the only issue is whether the SBE violated the order.

Defendants argue that they have not violated the Court's order on three grounds. First, defendants point out that the notice of the escape assessment that they sent to Santa Fe included a statement that "no county will collect or seek to collect any tax based on this escape assessment pending the outcome of the Board's appeal in USCA Ninth Circuit No 95-15999." See Notice of Escape Assessment, Pla'a Mem., Ex. C at 2.

Secondly, the SBE contends that it had to issue the notice of escape assessment in order to comply with its mandated responsibilities under the California Construction, art. XIII, sec. 19 and under Sections 721 and 861 of the Revenue and Taxation Code. Section 861 mandates:

> If any property subject to assessment by the board pursuant to Section 19 of Article XIII of the constitution escapes assessment, the board shall assess it in accordance with Section 864 at its value on the lien date of the year in which it escaped assessment.

Cal. Rev. & Tax Code § 861. The Code further requires that an escape assessment be made within four years of July 1 of the assessment year in which the property escaped assessment, absent the application of the penalty set forth in § 863. Cal. Rev. & Tax Code § 866. According to these provisions, the SBE was required to adopt any escape assessments for tax year 1991 on or before July 1, 1995, or else such assessments would be lost.

Finally, defendants argue that the "Subject Property" of the Court's 1994 judgment included Santa Fe's class 891 Commuter Property for only the tax year 1992, not for 1991. According to the Court's definition of the "Subject Property" in its Findings of Fact and Conclusions of Law, the only Commuter Property to which the judgment applied

was "properties which the SBE assigned both class codes 1 and, 891 to in tax year 1992, based on Santa Fe's negotiations with various southern California transit districts to sell track and/or trackage rights for commuter purpose[s]." However, the Court's injunction applied to taxes on such property for tax years 1989 through 1992. Since it is unclear whether the Court's Order applies to assessments on Santa Fe's class 891 Commuter Property for tax years 1989 through 1992 or just for tax year 1992, the Court shall not base its decision on this argument. Nonetheless, the Court finds insufficient grounds for contempt based on defendants' other arguments.

"Substantial compliance with a court order is a defense to an action for civil contempt." Balla, 869 F.2d at 466. As part of a showing of substantial compliance, the defending party must prove that it has taken "all reasonable steps" necessary to comply with the order. Balla, 869 F.2d at 466; In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987); Gifford v. Heckler, 741 F.2d 263, 265 (9th Cir. 1984) (citing Shuffler, 720 F.2d 396, 404 (9th Cir. 1976)). Given the SBE's responsibilities under the California Constitution and the California Revenue & Tax Code and their clear attempt to comply with the April 24, 1995, Partial Judgment, the Court finds that the SBE was in substantial compliance with the Court's orders. By explicitly stating that the notice of escape assessment was not collecting or seeking to collect any taxes in violation of the Court's orders, the SBE took reasonable steps to comply. Therefore, the Court finds insufficient grounds for contempt.

III. CONCLUSION

For the foregoing reasons, the Court hereby DENIES plaintiff's motion for an order to show cause why defendants should not be held in contempt.

IT IS SO ORDERED.

Dated: February 26, 1996.

D. Lowell Jensen
United States District Judge